

ROBERT McNAMARA AND THE ART AND LAW OF CONFESSION: “A SIMPLE DESULTORY PHILIPPIC (OR HOW I WAS ROBERT McNAMARA’D INTO SUBMISSION)”†

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We have . . . become a singularly confessing society. The confession has spread its effects far and wide. It plays a part in justice, medicine, education, family relationships, and love relations, in the most ordinary affairs of everyday life, and in the most solemn rites; one confesses one’s crimes, one’s sins, one’s thoughts and desires, one’s illnesses and troubles; one goes about telling, with the greatest precision, whatever is most difficult to tell. . . . Western man has become a confessing animal.¹

† My apologies to PAUL SIMON, *A Simple Desultory Philippic (Or How I Was Robert McNamara’d into Submission)*, on PARSLEY, SAGE, ROSEMARY, AND THYME (Columbia Records 1966).

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1. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 59 (Robert Hurley trans., Vintage Books 1990) (1976).

In East and in West, nowadays, the idea of responsibility is in a sad condition.²

Imagine a modern day Rip Van Winkle awakening from a nearly 30-year slumber in 1995. Much about the world, from the end of the Cold War and the collapse of the Soviet Union, to personal and notebook computers, fax machines, and music videos would be strikingly different. One apparent constant that he might find reassuring would be the opprobrium heaped on Robert McNamara by critics both on the left and the right.

Of course, the barrage of criticism directed toward McNamara has not really been constant during our Rip Van Winkle's lost years. Rather, the criticism McNamara faced during the Vietnam War was renewed 30 years later following the publication of *In Retrospect*,³ McNamara's memoirs recounting his time as Secretary of Defense and architect of the Vietnam War during the Kennedy and Johnson administrations. Whatever their differences regarding the Vietnam War, most critics greeted McNamara's musings on "The Tragedy and Lessons of Vietnam" negatively and often vituperatively; neither McNamara's past conduct nor his recent reminiscences escaped their criticism. Critics dismissed the book as offering disappointingly few new revelations or insights.⁴ Long-time McNamara critic David Halberstam called it "a shallow, mechanistic, immensely disappointing book," which is "almost devoid of . . . insight."⁵ Nor did it succeed in the eyes of many on the level of craft.⁶

2. C. WRIGHT MILLS, *THE CAUSES OF WORLD WAR THREE* 170 (1958).

3. ROBERT S. MCNAMARA, *IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM* (1995).

4. See, e.g., Hilary Masters, *A Crying Shame: McNamara's Retrospective of America's Tragic Involvement in Vietnam Comes Just a Bit Too Late*, PITTSBURGH POST-GAZETTE, June 4, 1995, at G9 ("[T]hese 400 or so pages contain little that is new to anyone who has studied the Vietnam War . . ."); Allan R. Millett, *McNamara Memoir Compounds Errors of Vietnam*, COLUMBUS DISPATCH, May 7, 1995, at 6F ("There is virtually nothing original about . . . McNamara's account of decision-making or lack thereof in the Kennedy and Johnson administrations."). But see George C. Herring, *The Wrong Kind of Loyalty: McNamara's Apology for Vietnam*, FOREIGN AFF., May 1, 1995, at 153, 154 (noting that while in general the memoir adds little information or new insights, "McNamara does shed new light on the origins of the bombing halt of late 1965 and his inception of the Pentagon Papers project, and he provides important new examples of the way Johnson in the last years of his presidency squelched internal dissent . . . [along with] some illuminating personal insights . . .").

5. David Halberstam, *Years Later, McNamara is Still Shameful*, CAP. TIMES (Madison, Wis.), Apr. 21, 1995, at 11A.

6. See, e.g., Randy Fertel, *Who's Sorry Now?*, TIMES-PICAYUNE (New Orleans), Apr. 23, 1995, at E8 (describing McNamara's prose as "bureaucratic" and "without distinction").

Critics reserved their bitterest words for McNamara, himself. Many discerned within the pages of *In Retrospect* the same detestable traits that they had long ascribed to him. After all these years he was still arrogant, still an elitist, still a sycophant; he still displayed a bookkeeper's or Harvard MBA's sensitivity to human affairs, and still did not understand the disaster that he was so instrumental in creating.⁷ The odium has been unrelenting. Former Congressman Father Robert Drinan decried McNamara's "moral illiteracy and abject cowardice" and asked, rhetorically, whether McNamara should go to prison for his role in promoting the Vietnam War.⁸ Halberstam called him a "charlatan" and a liar "so contorted and so deep in his own unique self-delusion and self-division that he still doesn't know who he is and what he did at that time."⁹ Journalist Woody West characterized McNamara as a toady to former anti-war radicals who had openly embraced the enemy during the war, but whose attention and approbation McNamara now craves since they have become part of the elite.¹⁰ While some critics faulted McNamara for failing to voice his doubts about the war at a time when speaking out might have influenced events, others faulted him for ever voicing his doubts at all.¹¹

Nor were his critics prepared to forgive him for past wrongs. The *New Republic's* Mickey Kaus was only slightly more strident than his compatriots, writing: "Has any single American of this century done more harm than Robert McNamara?"¹² McNamara's

7. See *id.*; see also Victor Gold, *In Retrospect: The Tragedy and Lessons of Vietnam by Robert S. McNamara with Brian Van DeMark*, AM. SPECTATOR, June 1995, at 67 (book review); Halberstam, *supra* note 5; John Kolbe, *Joining Vietnam Protesters; McNamara Isn't Writing for Most Americans*, PHOENIX GAZETTE, May 5, 1995, at B9; Woody West, *McNamara Met the Enemy and It Turned Out to Be Him*, WASH. TIMES, Dec. 11, 1995, at 40.

8. Robert F. Drinan, *Should Robert McNamara Go to Prison? (for Promoting the Vietnam War)*, NAT'L CATH. REP., Apr. 21, 1995, at 24.

9. Halberstam, *supra* note 5.

10. See West, *supra* note 7 ("McNamara lends credence [to the message of 1960s radicals who opposed the United States' involvement in Southeast Asia] as he squirms to patch his huge ego.").

11. See *id.* ("McNamara would do well by the nation he disserved at the Pentagon were he to . . . take a vow of silence."); Peter Lucas, *I Man's Silence Led Men to Their Deaths*, BOSTON HERALD, May 28, 1995, at 9; Michael Zuzel, *Sorrys Cannot Give Us Back Everything We Lost in Vietnam*, COLUMBIAN (Vancouver, Wash.), Apr. 13, 1995, at A13.

12. Mickey Kaus, *Who's Sorry Now*, NEW REPUBLIC, May 1, 1995, at 6, 6. Kaus conceded that Lyndon Johnson bore greater responsibility for the Vietnam War, but he described McNamara as a "Renaissance man" of harm. *Id.* He ascribes to McNamara responsibility for sowing the seeds of the destruction of the American economy during his days at Ford Motor

revelation that he was really a closet dove did nothing to rehabilitate his reputation. All the more reason, critics on the left concluded, to hold him accountable for the carnage, or, in the words of the *New York Times*, for "wasting lives atrociously."¹³ Critics on the right, conversely, took it as further proof that McNamara's timidity was largely responsible for American defeat in an otherwise "winnable" war.¹⁴

Given the intensity of feeling that both the Vietnam War and McNamara provoked in the 1960s, the response to *In Retrospect* is hardly surprising. What is more interesting about both the book and the reaction to it is the common understanding of *In Retrospect* as a "confession." The language of contrition, repentance, and confession is prevalent both in the book and in the critical and public response to it. Further, there is near-consensus that McNamara's *mea culpa* is inadequate, although there is no consensus on how or why it fails. This focus on confession is appropriate for our times. The confessional impulse has never seemed so strong nor so pervasive. Public confessions have come from all corners: from the expressions of national remorse by Japan¹⁵ and France¹⁶ for crimes against humanity during World War II, to the Southern Baptist Convention's apology for its support of slavery and racism;¹⁷ from President Clinton's apol-

Company. *Id.* During his stint as head of the World Bank, according to Kaus, McNamara "helped ruin the entire world's economy." *Id.*

13. Editorial, *Mr. McNamara's War*, N.Y. TIMES, Apr. 12, 1995, at A24.

14. See, e.g., William E. Colby, *Vietnam War Was a Noble Cause That Lost Because of McNamara*, BUFFALO NEWS, May 7, 1995, Viewpoints, at 11 (arguing that McNamara's mistakes turned the American public against the war); *Old-timers Attack McNamara Book*, COM. APPEAL (Memphis), Nov. 10, 1995, at 2A (reporting on conference on McNamara's book sponsored by the Vietnam Veterans Institute and quoting U.S. Grant Sharp, who commanded the U.S. Pacific fleet in the early years of the war: "We could have won it. We were not allowed to do it, and that was caused by Robert McNamara's use of his office as Secretary of Defense.").

15. See Sheryl WuDunn, *Premier of Japan Offers 'Apology' for Its War Acts*, N.Y. TIMES, Aug. 15, 1995, at A1. As in the case of McNamara, Prime Minister Murayama's apology sparked controversy within and without Japan regarding both the appropriateness and adequacy of the apology. See *id.*; see also T.R. Reid, *Asia Underwhelmed by Japan's Apology*, WASH. POST, Aug. 16, 1995, at A21 (detailing mixed reaction of other Asian nations to Japanese apology); Sheryl WuDunn, *Japanese Apology for War Is Welcomed and Criticized*, N.Y. TIMES, Aug. 16, 1995, at A3 (discussing reaction both inside and outside of Japan to Prime Minister Murayama's apology).

16. See Marlise Simons, *Chirac Affirms France's Guilt in Fate of Jews*, N.Y. TIMES, July 17, 1995, at A4.

17. See Gustav Niebuhr, *Baptist Group Votes to Repent Stand on Slaves*, N.Y. TIMES, June 21, 1995, at A2.

ogy for the Tuskegee syphilis experiments,¹⁸ and Pope John Paul II's apology for the Catholic church's mistreatment of women,¹⁹ to more banal examples such as Hugh Grant²⁰ and the daily burlesque of public confession found on daytime television talk shows.²¹

The near-universal rejection of McNamara's confession raises a variety of questions about the function and meaning of confession in public life generally, and in law more particularly. What is the social worth of confession? How do we measure a confession's adequacy or inadequacy? When do we require more than words? What do the criticisms of *In Retrospect* teach us, not only about McNamara, but about the norms of confession and forgiveness?

This Article examines McNamara's "confession" and the public response to it within the context of an American tradition of confession in law and literature. Part I traces that tradition to the criminal conversion narratives and gallows speeches of colonial New England. Puritan society had clear expectations of what it took to make a good confession, and the Article identifies these rules for confession. It also examines the functions of confession in that society and argues that these confessions had several social consequences, including easing the consciences of those implicated in the criminal's punishment; bolstering civil and religious authority; warning the community as a whole of the perilous state of their own souls; and, rather surprisingly, creating communal solidarity with the condemned criminal. It then considers the secularized form of this tradition, with special emphasis on the role of a defendant's acceptance of responsibility in criminal sentencing. While these secular confessions lack much of the drama of criminal conversions and gallows speeches, many of the norms for a good secular confession resemble their religious counterparts from Puritan New England. While many of the rules of confession have endured, today's acceptance of responsibility nevertheless lacks much of the social meaning of Puritan confession. Unhinged

18. See Alison Mitchell, *Clinton Regrets 'Clearly Racist' U.S. Study*, N.Y. TIMES, May 17, 1997, at A10.

19. See Celestine Bohlen, *Pope Calls for an End to Discrimination Against Women*, N.Y. TIMES, July 11, 1995, at A11.

20. See Chris Riemenschneider, *Actor Hugh Grant 'Fesses Up' to Leno on 'Tonight Show'*, L.A. TIMES, July 11, 1995, at B1 (reporting on Hugh Grant's admission during a Tonight Show appearance after his arrest for "lewd conduct" that "he did a bad thing").

21. See generally PATRICIA JOYNER PRIEST, PUBLIC INTIMACIES: TALK SHOW PARTICIPANTS AND TELL-ALL TV (1995) (analyzing motives of talk show guests); Jane Whitney, *When Talk Gets Too Cheap*, U.S. NEWS & WORLD REP., June 12, 1995, at 57 (former talk show host likening the contemporary talk show to an "electronic confessional").

from the drama of sin, damnation, and salvation, and largely removed from public view, acceptance of responsibility serves neither as a reminder to the public of the legitimacy of civil and religious authority, nor as a warning to its members of the perilous state of their own souls. Further, it does not create feelings of communal solidarity with the defendant, and it fosters the reintegration of the miscreant into the community only in the sense that his prison term is over sooner than it would be absent his acceptance of responsibility. Part II turns to *In Retrospect*, and to the various reactions it evoked. Approaching the subject first in the manner of a review of reviews, this Article examines the critical reactions to the book to elucidate contemporary expectations regarding meaningful confession. It shows that much of the criticism has been framed in terms that track the norms for confession described in Part I. It then applies these norms and finds McNamara's confession wanting. The Article concludes by considering the extent to which the variety of reactions to McNamara's confession reflects our failure as a nation to come to terms with our Vietnam experience.

I. CONFESSION IN LITERATURE AND LAW

A. Puritan Conversion Narratives

On July 31, 1701, before an estimated crowd between four and five thousand strong, a twenty-one year old woman named Esther Rodgers mounted the gallows in Ipswich to be hanged for the crime of infanticide.²² According to the contemporary account of her life and death, compiled by John Rogers, a local minister,²³ she ap-

22. See Lawrence W. Towner, *True Confessions and Dying Warnings in Colonial New England*, in *SIBLEY'S HEIR: A VOLUME IN MEMORY OF CLIFFORD KENYON SHIPTON* 523, 523 (Colonial Soc'y of Mass. 1982).

23. The story of Esther Rodgers's life, crime, conversion, and death is told in JOHN ROGERS, *DEATH: THE CERTAIN WAGES OF SIN TO THE IMPENITENT: LIFE THE SURE REWARD OF GRACE TO THE PENITENT: TOGETHER WITH THE ONLY WAY FOR YOUTH TO AVOID THE FORMER, AND ATTAIN THE LATTER* (1701). In addition to Rogers's work, my discussion of Esther Rodgers's confession, dying words, and execution draws on DANIEL A. COHEN, *PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674-1860*, on Towner, *supra* note 22, and on Daniel E. Williams, "Behold a Tragic Scene Strangely Changed into a Theater of Mercy": *The Structure and Significance of Criminal Conversion Narratives in Early New England*, 38 AM. Q. 827 (1986), reprinted in 10 CRIME & JUSTICE IN AMERICAN HISTORY: REFORM 367 (Eric H. Monkkonen ed., 1992) [hereinafter REFORM]. Because these sources are more readily available than Rogers's book, where possible, I cite to the secondary literature and note their source

proached death with such "Composure of Spirit, Cheerfulness of Countenance, pleasantness of Speech, and a sort of Complaisantness in Carriage towards the Ministers who were assistant to her [that she] melted the hearts of all that were within seeing or hearing, into Tears of affection."²⁴ Indeed, the ministers who contributed to John Rogers's volume, and probably most of the witnesses to her execution, believed that Esther Rodgers died a saint.²⁵

While the final act of Esther Rodgers's story was a picture of triumph and salvation, her story began inauspiciously.²⁶ Confession played a critical role both in causing and in signifying her regeneration. According to her confessional autobiography, which lay at the heart of Rogers's book, Esther Rodgers was apprenticed at age thirteen to a household in Newbury, Massachusetts (a town neighboring Ipswich). There she was taught to read and catechized, apparently with little effect. At the age of seventeen, she had taken up with a "Negro Lad" living in the same house and had become pregnant.²⁷ She carried the pregnancy to term without detection, then smothered her baby, burying it in her master's garden to avoid "Public Shame."²⁸

Although she suffered through an initial period of guilt and fright while completing her apprenticeship, Rodgers reverted to her sinful ways when she began working in a tavern outside of Newbury.²⁹ After a year, she returned to Newbury.³⁰ She eventually found work in a household where she partook of old bad habits and entertained "Sinful Companions in a back part of the House."³¹ Pregnant again, Rodgers once more concealed the pregnancy. She murdered and

in Rogers's account for quoted passages. The precise date of Esther Rodgers's execution, cannot, however, be found in the secondary sources. Instead, see ROGERS, *supra*, at 137. For an estimate of the size of the crowd, see *id.* at 153.

24. ROGERS, *supra* note 23, at 153, *quoted in* Towner, *supra* note 23, at 523.

25. See COHEN, *supra* note 23, at 59-63. The Reverend Samuel Belcher, one of the ministers who tended to her conversion, described her hanging corpse as "consecrated" fruit. ROGERS, *supra* note 23, at 120.

26. As Samuel Belcher wrote, hers was a story of "a Pillar of Salt Transformed into a Monument of Free Grace." ROGERS, *supra* note 23, at 118, *quoted in* COHEN, *supra* note 23, at 60.

27. COHEN, *supra* note 23, at 61.

28. *Id.* (quoting ROGERS, *supra* note 23, at 122); Towner, *supra* note 23, at 523.

29. See COHEN, *supra* note 23, at 62.

30. See *id.*

31. *Id.* (quoting ROGERS, *supra* note 23, at 123-24).

buried the child after delivery.³² This time, however, her crime was quickly detected, and Rodgers was arrested.³³

After a month of detention in Newbury, where she felt overcome by confusion and fear of the punishment that awaited her, Rodgers was moved to Ipswich to await trial. In Ipswich, she initially resisted the efforts of local ministers to help her to repent and to seek God's mercy and solace. Eventually, the considerable efforts of several ministers, especially John Rogers, in conjunction with the efforts of many Ipswich laypersons, began to work a change in Rodgers. She repented, confessed her sins, and sought comfort in God, the Bible and the companionship of the spiritual community of Ipswich.³⁴ She came to have a growing sense that she had experienced a conversion and would be saved in the next world, although not in this one. Those who spoke with her in prison or who observed her as she lived her final days and then cheerfully faced the gallows tended to concur.³⁵

Esther Rodgers offered at least two public confessions. Rogers's volume contained one.³⁶ In the second, which she spoke as her last statement from the gallows, she warned the crowd, especially the young, to heed her experience and learn that the path toward great sin begins with smaller sins such as disobedience and social intercourse with bad company.³⁷

Public confession's role in Puritan New England went well beyond the rituals of execution, and Rodgers's confessions should be understood in that light. Confession served an important function both within Puritan churches and in broader society. The church was an important adjunct to the state in helping to maintain order, as church discipline reached beyond modern conceptions of religious or

32. See *id.* at 62. Like Rodgers, several other criminals featured in Colonial New England's execution sermon and criminal conversion literature were condemned for killing their usually illegitimate babies. This fact, combined with the references in their stories to keeping "bad company" and engaging in fornication and other "lewd practices" cries out for a gendered account. See, e.g., *id.* at 55 (Sarah Threeneedles); *id.* at 72-79 (Patience Boston); *id.* at 89-90 (Penelope Kenny); *id.* at 147-49 (Elizabeth Wilson). For a discussion of Cotton Mather's unsuccessful attempt to bring Margaret Gaulacher to public confession for the murder of her child, see Walter Lazenby, *Exhortation as Exorcism: Cotton Mather's Sermons to Murderers*, 57 Q.J. SPEECH 50 (1971), reprinted in REFORM, *supra* note 23, at 275, 279-81.

33. See COHEN, *supra* note 23, at 62; Towner, *supra* note 232, at 524.

34. See COHEN, *supra* note 23, at 62; Towner, *supra* note 23, at 524.

35. See COHEN, *supra* note 23, at 62-63.

36. See ROGERS, *supra* note 23, at 121-27, 133-34.

37. See *id.* at 63.

moral offenses.³⁸ Churches could discipline by admonition or, ultimately, excommunication. In both instances the church sought the repentance and reformation of the individual. A measure of that repentance, although not necessarily a sufficient indicator when unaccompanied by changed behavior, was the offender's willingness to confess her misdeeds to the congregation. The congregation as a whole took great pains to bring the offender to this point of confession.³⁹

Confession similarly played an important role in the New England courts. As with church discipline, the goal was to restore the criminal to the community by reawakening his conscience and reforming him.

To accomplish this goal, New England courts sought to make the offender "an active participant in the punitive process."⁴⁰ New England Puritans understood "conviction" to have the secondary meaning of convincing the wrongdoer of the wrongfulness of his acts and of the legitimacy of the court's response.⁴¹ Real conviction, manifest in confession, would often serve to mitigate punishment in noncapital cases.⁴² Consistent with this emphasis on reawakening the offender's conscience and encouraging reformation were the common punishments of public admonition, and of the injunction to confess publicly or to apologize publicly to the victim.⁴³

Public confession was, in other words, commonplace in Puritan New England. Given its pervasiveness and its important role in maintaining an orderly society, New Englanders quite naturally developed certain expectations and norms regarding confession. First, confession was not an end in itself; instead, it was a means of progres-

38. See GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 91 (1960).

39. See *id.* at 92-93; Towner, *supra* note 23, at 526-27.

40. HASKINS, *supra* note 38, at 206; see also Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 AM. J. LEGAL HIST. 107, 127 (1989) (discussing the willingness of judges to impose more lenient punishment if an offender admitted wrongdoing); Towner, *supra* note 23, at 528-29 (discussing three types of confessions in seventeenth century Massachusetts: a simple admission of guilt at the time of trial; a public acknowledgement of crime, often required as part of the offender's sentence; and a confession after trial and sentencing but before the sentence was over—often part of a plea for clemency).

41. See HASKINS, *supra* note 38, at 207.

42. See *id.* at 207; Cahn, *supra* note 40, at 127. Cahn also notes, however, that the "Cotton Code" of 1648 limited magisterial discretion to mitigate punishment. See *id.* at 132.

43. See *id.* at 209-10.

sion to something else: most importantly, restoration of the individual to church or society, and, perhaps, with God's grace, regeneration of the miscreant as a saint.

Further, the path towards sincere repentance and salvation was both difficult and strictly charted, and no one could make the journey alone. Rodgers's contemporaries regarded Satan as a powerful and omnipresent adversary.⁴⁴ Any struggle on behalf of Esther Rodgers against so cunning and seductive an opponent would not be easy.⁴⁵ Recall that Rodgers's first response to her crime was fear and confusion, not remorse. Rodgers wrote: "Satan made me believe that it was impossible such a Sinner, should be saved. . . . It was Satans [sic] Temptation to keep me from Repentance."⁴⁶ It was only through the combined efforts of John Rogers and many others that she gradually began to confront both her crime and her past with a sentiment of true penitence.

Nor would any route to repentance and regeneration do. As Daniel Williams has described, Rogers's volume, like many other contemporary criminal conversion narratives, set out a step-by-step guide to salvation.⁴⁷ The prescribed path required that the condemned first be brought to the point of "spiritual agony" by making him aware of the full horror of his sins.⁴⁸ The purpose of this effort was to make the criminal recognize his utter worthlessness and to bring him to the point of self-repudiation.⁴⁹ Only then could the criminal be directed onto the path toward regeneration, and only then could the criminal make a sincere confession.⁵⁰

44. For a discussion of the Puritan conception of Satan, see ANDREW DELBANCO, *THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL* 42-55 (1995). My thanks to my colleague George Dent for alerting me to this source.

45. *See id.*

46. ROGERS, *supra* note 23, at 126.

47. *See* Williams, *supra* note 23, *reprinted in* REFORM, *supra* note 23, at 372. As Williams recognizes, these narratives, and the suggestion that they might serve as roadmaps toward conversion, bore the strong taint of a "covenant of works," a notion otherwise foreign to Puritanism. *Id.* A number of condemned criminals read earlier criminal conversion narratives as part of their preparation for conversion. *See, e.g.,* COHEN, *supra* note 23, at 70, 73. As discussed below, the intended audience for the conversion narratives was not merely the condemned, but the society as a whole.

48. *See* Williams, *supra* note 23, *reprinted in* REFORM, *supra* note 23, at 376.

49. *See id.*

50. *See id.* at 377.

Not every confession was adequate. Often the sincerity and completeness of a late confession would remain in doubt.⁵¹ Puritan ministers were quick to remind condemned criminals that while God often makes great sinners exemplars of grace and salvation, "[l]ate Repentance is seldom true."⁵² Further, the confessor must not minimize or excuse his act, or deny full responsibility for its consequences. Increase Mather warned two men convicted of the ax murder of their master that so long as each offered only a partial confession and continued to insist that the other dealt the fatal blow, salvation would evade them.⁵³

Nor did confession alone suffice. The criminal had to exhibit visible signs of saintliness. In the words of one Massachusetts minister, Nathaniel Clapp, the condemned must "shew the Truth of Repentance" through obedience and cooperation.⁵⁴ In addition to confession and an accompanying change of behavior, the criminal must show a desire to glorify God by becoming a willing and penitent participant in his own execution.⁵⁵ He could fulfill this role by bearing himself humbly and meekly in the face of his impending execution and acknowledging the fitness of the punishment, while simultaneously looking with growing confidence towards the afterlife.⁵⁶ Finally, as part of the ritual of execution he must repent again in a last dying speech delivered from the gallows, an event that was the culmination of the penitent criminal's efforts and preparations while in jail.⁵⁷ These last words served multiple ends. Once again the criminal confessed his crime and accepted his punishment as just according to the laws of man and God. Additionally, his last dying speech served as a warning to the assembled that sin and small acts of disobedience lead

51. See, e.g., COHEN, *supra* note 23, at 49-54 (relating the confession of condemned murderer James Morgan and the skepticism it engendered in the mind of Increase Mather).

52. *Id.* at 53 (quoting INCREASE MATHER, A SERMON OCCASIONED BY THE EXECUTION OF A MAN FOUND GUILTY OF MURDER (2d ed. 1687)).

53. See Towner, *supra* note 23, at 530 (discussing INCREASE MATHER, THE WICKED MAN'S PORTION (1675)). For additional discussion of this case, see COHEN, *supra* note 23, at 47-48.

54. Williams, *supra* note 23, reprinted in REFORM, *supra* note 23, at 373.

55. See *id.* at 373-83. Rodgers wrote, "I find a willingness in me to accept the punishment of my sins and a readiness to glorify the Justice of God by suffering the Death I have deserved." ROGERS, *supra* note 23, at 131; cf. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 43 (Alan Sheridan trans., 1977) (stating that the ritual of execution in early modern France made the guilty party act as "the herald of his own condemnation").

56. See Williams, *supra* note 23, reprinted in REFORM, *supra* note 23, at 382.

57. See *id.* at 383.

to graver sin and a tragic end, as exemplified by the criminal's life history.⁵⁸

What were the meanings and effects of this enthusiasm for confession, and for these ritualized confessional narratives and gallows dramas? For the individual, confession sometimes brought spiritual comfort and an eased conscience.

It also facilitated sentencing mitigation before either an earthly or a heavenly tribunal, depending on the nature and gravity of the crime. In noncapital cases, confession might lead to a lessening of the sentence, on the theory that a confession indicated that the criminal's reformation was well under way if not complete. Alternatively, public confession might be the prescribed penalty, so that after a criminal confessed, no penalty remained to be paid. In either case, confession helped to speed the wrongdoer's reintegration into both the spiritual and civil community. In capital cases, however, confession had no effect on earthly justice. Nor could Puritans hold, consistent with their religious beliefs, that it could influence the heavenly judge. Yet in their execution sermons and in the conversion narratives that they compiled, Puritan ministers indicated that a suitable confession and last dying statement might be necessary not only to evidence saintliness, but to remove an impediment to salvation.⁵⁹

Further, by confessing, Esther Rodgers could become the heroine of her life story. For a young, troubled, and otherwise marginal household servant such as Esther Rodgers, public confession brought attention beyond anything she had previously experienced; similarly, it generated an otherwise unobtainable outpouring of affection. In some sense her crime and punishment were "the best things that ever happened to her," as well as the worst.⁶⁰

Public confession was obviously a social act with social meaning and consequences in the sense that both the gallows speech and the conversion narrative were directed toward an audience and crafted in conformance to a variety of conventions expected by that audience.⁶¹

58. See Towner, *supra* note 23, at 534-35; Williams, *supra* note 23, reprinted in REFORM, *supra* note 23, at 383-84.

59. See Towner, *supra* note 22, at 533-34.

60. The phrase and the insight come from my colleague, Spencer Neth. Daniel Cohen similarly notes: "In meeting the moral arbiters of the community on their own ground, the once lowly servant and disgraced deviant had not merely salvaged her private sense of self-worth but established a formidable public dignity as well." COHEN, *supra* note 23, at 64.

61. For a discussion of the degree to which the condemned were coached in how to act and what to say, and of the role that ministers played in translating their accounts into standard lan-

But these confessions were public in yet another sense: they depended on an outpouring of community participation, most importantly by ministers, but also by laypeople, to bring the criminal to penitence and possible salvation. This is clear in the case of Esther Rodgers, as a battery of ministers repeatedly engaged her in an effort to redeem her. Many of the church members of Ipswich joined in the ministerial efforts as they took turns visiting her in prison and welcoming her into their homes for "whole days of Fasting and Prayer."⁶²

Why did the people of Ipswich struggle for and with Rodgers? As Daniel Cohen notes, one reason was "communal chauvinism."⁶³ More important, however, was the sense of communal responsibility for sin, a theme that Puritan ministers emphasized in execution sermons.⁶⁴ Coupled with the belief that "[t]he sin of one was the sin of all,"⁶⁵ there was a sense that little separated the condemned criminal's depravity from that of those who would witness his execution. In what Andrew Delbanco has aptly described as a "culture saturated with the consciousness of sin,"⁶⁶ this latter theme reverberated in both the execution sermons and the condemneds' confessions and

guage and form, see Williams, *supra* note 23, *reprinted in* REFORM, *supra* note 23, at 373-75 & n.33. Sometimes no amount of coaching would succeed. In the case of the publicly unrepentant Margaret Gaulacher, Cotton Mather went so far as to read an "instrument" he had obtained from her in prison, but which she subsequently rejected, whose text followed the standards of gallows speeches. See Lazenby, *supra* note 32, *reprinted in* REFORM, *supra* note 23, at 280.

62. COHEN, *supra* note 23, at 60-61, 64; see also *id.* at 44 (describing the efforts needed by a minister to bring a criminal, in this instance an English Protestant, to repentance); Lazenby, *supra* note 32, *reprinted in* REFORM, *supra* note 23, at 279-80 (describing visits by laypeople, in addition to ministers, to read Scripture and other religious works to Margaret Gaulacher).

63. COHEN, *supra* note 23, at 64. As Cohen notes, the narrative indicates that Rodgers's sinful life and crimes occurred in neighboring Newbury, but, unlike Ipswich, that community was unable to bring her to repentance. See *id.*

64. See HASKINS, *supra* note 38, at 93. On the use of this theme in execution sermons, see generally Ronald A. Bosco, *Lectures at the Pillory: The Early American Execution Sermon*, 30 AM. Q. 156 (1978), *reprinted in* REFORM, *supra* note 23, at 26, 32 (discussing the themes of de-cension and the jeremiad form of these execution sermons). The tone of these sermons is exemplified by Samuel Danforth's *The Cry of Sodom Enquired into*, in which he warned that "The Church cannot be cleansed . . . [and] the Land cannot be Cleansed, until [they] hath spued out this Unclean Beast. The execution of Justice upon such a notorious Malefactor, is the onely way to turn away the wrath of God from us, and to consecrate our selves to the Lord." *Id.* at 27 (quoting SAMUEL DANFORTH, *THE CRY OF SODOM ENQUIRED INTO* 8-9 (1674)). But see COHEN, *supra* note 23, at 49 (arguing that jeremiadic motifs of communal guilt and punishment became less central by the late seventeenth century).

65. HASKINS, *supra* note 38, at 93.

66. DELBANCO, *supra* note 44, at 45.

last dying speeches,⁶⁷ and heightened the importance of the drama of sin and repentance. In a preface to Rogers's book, Reverend William Hubbard pointedly linked the judgment and sentence of Esther Rodgers with the judgment and sentence of the "Great and General Assembly that will appear at the Great Day to receive their final sentence."⁶⁸

On the gallows, Esther Rodgers stood at once degraded and triumphant.⁶⁹ She had recounted the details of her shameful past with abundant self-loathing, and the magistrates had judged her crimes so heinous and so defiantly rebellious against God that her mortal existence could no longer be tolerated, lest the whole community suffer God's wrath for failing to cast her out. Yet those who have left us a record of Rodgers's life and death reported that they and many of those assembled to witness the event had little doubt that she was among the elect chosen by God for salvation and glorious life everlasting. At once both condemned and saved, she was simultaneously expelled from the community and embraced by it. What did all of this mean for those who had condemned her and those who came to witness her last moments or who subsequently read Rogers's account of her life and death? What role did Rodgers's confession play in constructing a social meaning for these events?

Through her confession, Rodgers condemned herself. By confessing and acknowledging that she merited her punishment perhaps she eased the consciences of those charged with the duty either to judge her or to carry out her execution.⁷⁰ Indeed, she recounts that

67. See *infra* note 80 and accompanying text.

68. ROGERS, *supra* note 23, at A2.

69. On the concept of degradation ceremonies, and on execution as one such ceremony, see Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956).

70. On this function of confession, see FRANZ ALEXANDER & HUGO STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS* 216 (Gregory Zilboorg trans., rev. ed. 1956); MIKE HEPWORTH & BRYAN S. TURNER, *CONFESSION: STUDIES IN DEVIANCE AND RELIGION* 125 (1982) (citing LEON RADZINOWICZ, *HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 348 (1968)); Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 167 (1990). To be sure, Puritan society was not squeamish about capital punishment. See COHEN, *supra* note 23, at 101-06 (discussing seventeenth and eighteenth century justifications for capital punishment). Nevertheless, Kai Erikson suggests that given Puritan doctrines of predestination and the innate depravity of man, the emphasis on the criminal's confession and acceptance of the justice of his fate may have reflected a vague discomfort with his punishment and a wish "for the condemned man to forgive them." KAI ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 195 (1966).

she wanted to plead guilty at her trial, but was not permitted to because of the form of her indictment. She was neither surprised nor disappointed to be condemned to die.⁷¹

Additionally, her confession strengthened both religious and civil authority within the state. As Kai Erikson has noted, "[t]o repent is to agree that the moral standards of the community are right and that the sentence of the court is just."⁷² By condemning her crime and embracing her punishment she legitimized the state's act and the law under which she was condemned. By restoring the consensus regarding the wrongfulness of her act, Esther Rodgers defused any possible challenges to that legitimacy.⁷³ Hence, the conversion narratives emphasized the willingness, and, in Rodgers's case, the joy, with which the condemned faced punishment.⁷⁴ Her acceptance of guidance from John Rogers and the other ministers, and her willingness to follow their script for her last days, bolstered their authority, as did the apparent soul-saving efficacy of the ministers' efforts on her behalf.⁷⁵

71. See ROGERS, *supra* note 23, at 131-32.

72. ERIKSON, *supra* note 70, at 195.

73. See Seidman, *supra* note 70, at 167; Towner, *supra* note 23, at 536; cf. FOUCAULT, *supra* note 55, at 38 ("It is not enough' . . . 'that wrong-doers be justly punished. They must if possible judge and condemn themselves.'" (footnote omitted) (quoting 1 P. AYRAULT, L'ORDRE, FORMALITÉ, ET INSTRUCTION JUDICAIRE, pt. i, ch. 14)). Contemporaneously the English found that public executions sometimes provoked riots and challenges to authority on behalf of the condemned. For a discussion of the English experience in the seventeenth and eighteenth centuries, see generally Peter Linebaugh, *The Tyburn Riot Against the Surgeons*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 65 (Douglas Hay et al. eds., 1975).

Stalin's show trials of the 1930s are probably the most notorious example, but hardly the only one, of the urge to legitimate prosecution and punishment by means of the condemned's confession, no matter the means used to obtain that confession. For a discussion of these trials and the importance of the defendants' self-renunciations, see ISAAC DEUTSCHER, *STALIN: A POLITICAL BIOGRAPHY* 372-78 (2d ed. 1967). For a fictional exploration of the dynamic between interrogator and prisoner during the Soviet purges of the 1930s, see ARTHUR KOESTLER, *DARKNESS AT NOON* (1941); cf. *L'AVEU [THE CONFESSION]* (Les Films Corona 1970) (exploring similar themes in the setting of Czechoslovakia in the 1950s; directed by Konstantin Costa-Gavras).

74. See COHEN, *supra* note 23, at 62-63 (describing how Rodgers's ecstasy increased as she approached her punishment); Williams, *supra* note 23, reprinted in REFORM, *supra* note 23, at 382-83. Rodgers stated on the day of her execution, "I many times have endeavoured to terrify myself with the thought of Death and my Execution; it seems rather a matter of comfort than terror to me." ROGERS, *supra* note 23, at 142. One convicted murderer, Hugh Stone, stated that he would insist on his execution should there be any sentiment for lessening his punishment. See Towner, *supra* note 23, at 536.

75. Indeed, some criminals reportedly specified the minister whom they wished to have preach their execution sermon, which could only enhance the minister's reputation, as did the

What Rodgers did not say in her confessions was as important as what she said. Like many of the other criminals featured in colonial New England's criminal conversion literature, Rodgers came from the margins of society, and like so many of them, her crime was killing her illegitimate children.⁷⁶ She might have told a story about temptation, seduction, and betrayal; about her isolation as a teenage apprentice in another person's household and her feelings of powerlessness when confronted with unwanted pregnancies. Her story might have confronted Puritan society with questions about the lot of poor young women and other relative outsiders in New England.⁷⁷ Such potential challenges to the assumptions of Puritan society remain unspoken in this literature.

Rodgers's confession further strengthened governing authority by tracing the genesis of her crime to smaller sins and crimes of disobedience. Crime, Emile Durkheim long ago argued, performs the social function of demarcating collective norms and creating greater social solidarity around those norms.⁷⁸ Rodgers's confession did more than simply marshal the "public temper" against infanticide, however. Typical of other contemporary criminal conversion narratives, Rodgers attributed the awful climax of her sinful behavior to more mundane sins of Sabbath-breaking, keeping company with wicked companions, and "running out" at night.⁷⁹ These were sins that many

opportunity to preach before the large crowd that public executions drew. See COHEN, *supra* note 23, at 6; see also Lazenby, *supra* note 32, reprinted in REFORM, *supra* note 23, at 276 (noting that Cotton Mather became a "best-selling" author by preserving and publishing sermons to murderers as well as their case histories).

76. See *supra* note 33 and accompanying text.

77. Other criminals who appear prominently in this literature describing their experiences of marginality include a converted Indian, a servant, and a runaway slave. See COHEN, *supra* note 23, at 69-79.

78. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 100-03 (George Simpson trans., 1933). Durkheim writes of this social function of crime, this capacity to create collective outrage:

Everybody is attacked; consequently, everybody opposes the attack. Not only is the reaction general, but it is collective It is not produced isolatedly in each one, but with a totality and a unity Crime brings together upright consciences and concentrates them. We have only to notice what happens, particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions which are exchanged, from all the temper that gets itself expressed, there emerges a unique temper . . . which is everybody's without being anybody's in particular. That is the public temper.

Id. at 102.

79. See ROGERS, *supra* note 23, at 123.

in her audience could recognize in their own behavior. Thus Rodgers stood as an affirmation of the civil and religious authorities' warnings about the wages of sin and as a vivid example of a fate that could easily be theirs.⁸⁰ Indeed, as Lawrence Towner has explained, the lives of crime recounted in the conversion narratives "[a]lmost invariably" trace their genesis to the violation of the Fifth Commandment's prescription to honor one's father and mother.⁸¹ The lessons of these narratives: disobedience to parents, masters, or other rightful authority led to the gallows and damnation.

Yet confession brought about a different sort of social solidarity than that conceptualized by Durkheim as a response to crime. The execution sermons, confessions, and dying speeches obscured rather than highlighted the demarcation between the condemned and the community. Each emphasized that the audience differed little from the condemned and risked replicating her fate. Rather than creating a solidarity in opposition to the criminal, the confession forged a collective solidarity that enveloped the condemned and returned her to the community. The drama of Esther Rodgers's sin and conversion stood synecdochically for the peril faced by the Puritan community and each of its members. Little wonder, then, the enormous effort undertaken by the community on her behalf. The elaborate efforts to induce confession and the rituals of execution constituted a ceremony of inclusion and reintegration.⁸² By restoring the consensus regarding the wrongfulness of her act, Rodgers "move[d] back into the community as a witness to h[er] own execution."⁸³ By her conversion, Rodgers joined the community of saints.

B. Acceptance of Criminal Responsibility

By century's end Americans held more ambivalent attitudes toward confession. The rituals of execution, execution sermons, and dying speeches had changed little from those of Puritan New Eng-

80. See Towner, *supra* note 23, at 534-37. In their execution sermons and other sermons to the condemned, the ministry took pains to reinforce the message for the community that little separated them from the condemned and that lesser sins were the seedbeds of greater ones. See Bosco, *supra* note 64, at 35-36; see also Lazenby, *supra* note 32, reprinted in REFORM, *supra* note 23, at 278 (describing Cotton Mather's sermons encouraging quick repentance for any sin lest the pain of unrepented-for sins aggregate to form the torture of eternal damnation).

81. See Towner, *supra* note 23, at 534-35.

82. For a discussion of confession as a ceremony of inclusion, see HEPWORTH & TURNER, *supra* note 70, at 14, 22-23, 37, 43-44, 129-30, 132 and *passim*.

83. ERIKSON, *supra* note 70, at 195.

land.⁸⁴ Ministers continued to dispense messages of warning and hope through the publication of criminal conversion narratives, although these narratives now competed with newspapers and other publications that offered secular accounts of executions.⁸⁵ These rites and texts continued to have social consequences similar to those they had engendered earlier in the century.⁸⁶ They bolstered the authority of civil and religious authorities and legitimated the state's administration of punishment,⁸⁷ while they concurrently rehumanized the criminal.⁸⁸ Yet accompanying the then-emergent sentiment favoring the abolishment of capital punishment came a renewed skepticism regarding conversions accomplished in the shadows of the gallows. Opponents of capital punishment argued that death cut short the process of reformation, which could be accomplished more effectively, and with less artificial pressure, in a penitentiary. Instead, they argued, capital punishment encouraged inauthentic conversion "spectacles."⁸⁹

In the wake of the American Revolution and well into the nineteenth century, courts appear to have been wary of confessions, and, indeed, of guilty pleas of any kind, plea bargained or otherwise. Historians of criminal justice have found almost no evidence of plea bargaining during this period, leading to the conclusion that plea bargains were rarely made.⁹⁰ Indeed, they have found that the rate of

84. See LOUIS P. MASUR, *rites of execution: capital punishment and the transformation of american culture, 1776-1865*, at 39 (1989). Masur notes that "Increase and Cotton Mather would have felt at ease with the sermons and confessions delivered at the gallows in the last quarter of the eighteenth century." *Id.* at 40. But see COHEN, *supra* note 23, at 89-100 (discussing the growing tendency during this period to talk not only about man's fallen nature and depravity, but also about environmental causes of crime).

85. Cf. MASUR, *supra* note 84, at 33 (noting that sermons were but one part of the execution day ritual). Masur also notes that ministers sometimes shared with civil authorities the role of producing conversion narratives. See *id.* at 34. For a discussion of the growing secular literature relating to crime and its punishment, see COHEN, *supra* note 23, at 24-32.

86. See MASUR, *supra* note 84, at 26.

87. See *id.*

88. See *id.* at 34-36 (discussing the effect of prisoners' last words of dying confessions).

89. MASUR, *supra* note 84, at 105-09 (describing the growing concern with the possibility of false confessions). The characterization of public ritualized executions as "not fit spectacles for the public gaze," was the Reverend Francis Parkman's. *Id.* at 109.

90. See THEODORE FERDINAND, *Boston's Lower Criminal Courts, 1814-1850*, at 49 (1992); see also, e.g., ALLEN STEINBERG, *The Transformation of Criminal Justice: Philadelphia, 1800-1880*, at 230-31 (1989) (noting that plea bargaining, in contrast to private settlement, which occurred under Philadelphia's system of private prosecution during the first half of the nineteenth century, emerged with the displacement of private prosecution by a criminal justice system built around professional police and prosecutors); Albert W. Alschuler,

guilty pleas (which, of course, are only sometimes the product of bargaining) was quite low in the early years of the Republic.⁹¹ Moreover, what little evidence exists suggests that courts may have actively dissuaded guilty pleas.⁹² In 1804 Massachusetts was quite possibly still the state where the confessional impulse was most robust. Yet that impulse was apparently tempered by the civil libertarian heritage of the Revolution, and in the only reported case on the subject, a Massachusetts trial court placed several obstacles before a defendant who sought to plead guilty to charges of rape and murder.⁹³ The court first explained to the defendant the consequences of his plea, "that he was under no legal or moral obligation to plead guilty," and that he was entitled to put the state to its proof against him.⁹⁴ When the defendant remained adamant about his guilty plea, the court remanded him to his cell to reconsider and instructed the clerk not to record his plea.⁹⁵ When he returned to court, the defendant remained insistent about his guilty plea.⁹⁶ The court accepted the plea, but only after ex-

Plea Bargaining and Its History, 79 COLUM. L. REV. 1, 4 (1979) (arguing that plea bargaining was rare until the mid-nineteenth century); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 L. & SOC'Y REV. 247, 249 (1979) (examining the rise of plea bargaining in Alameda county after 1880); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 L. & SOC'Y REV. 273, 275 (1979) (tying the increased use of plea bargaining to the development of urban police departments in the late nineteenth century); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261, 266 (1979) (explaining the expanded use of plea bargaining by the increasingly busy and lawyer-dominated trial practice of the nineteenth century). For a somewhat different view, see Jay Wishingrad, *The Plea Bargain in Historical Perspective*, 23 BUFF. L. REV. 499, 512-24 (1974) (arguing that despite some appellate decisions rejecting plea bargaining, tacit and explicit plea bargaining was part of the American criminal justice system from its origins). Even Wishingrad, however, finds no American decision that explicitly or tacitly approved of plea bargaining before the 1860s. See *id.* For criticism of Wishingrad's study, see Friedman, *supra*, at 247 (calling Wishingrad's study a "skimpy collection of cases," many of which were not about plea bargaining).

91. See STEINBERG, *supra* note 90, at 66, 75 (remarking on the lack of systematic guilty pleas in assault and battery and larceny cases prior to 1838, around which time a preference in sentencing for guilty pleas developed); see also Alschuler, *supra* note 90, at 12 (noting guilty pleas made up only 11-25% of pleas in several courts in the early nineteenth century). One finds a similar pattern in British courts at this time. See George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1275 & n.197 (1995) (noting that in one study of Surrey courts in the eighteenth century, guilty pleas comprised less than 5% of all pleas in petty larceny cases).

92. See Alschuler, *supra* note 90, at 12. In this regard, American courts followed the English common law tradition. See *id.* at 9-11; see also Langbein, *supra* note 90, at 305-06.

93. See *Commonwealth v. Battis*, 1 Mass. (1 Will.) 94, 95 (1804). Both Alschuler, *supra* note 90, at 11-12, and Wishingrad, *supra* note 90, at 514-15, discuss this case.

94. *Battis*, 1 Mass. (1 Will.) at 95.

95. See *id.*

96. See *id.*

aming under oath the sheriff, jailer, and the justice who had conducted the preliminary examination of the defendant to ensure that the prisoner was sane, and that his guilty plea had not been induced by any "promises, persuasions, or hopes of pardon."⁹⁷

While courts in the young republic may have regarded guilty pleas suspiciously, even to the point of questioning the sanity of a defendant who would relinquish his constitutional right to make the state prove his guilt to a jury, there is also some evidence that at sentencing, these courts favored defendants who had pled guilty.⁹⁸ Favorable sentencing treatment of those who pled guilty probably reflected a belief that those who accepted responsibility for their crimes had begun the reformation process, which they could be expected to complete more quickly than those who shunned responsibility for their crimes.⁹⁹ Perhaps it also reflected the belief that the genuinely remorseful criminal was more deserving of leniency and, posing less of a threat to society, was less in need of incapacitation.

The American criminal justice system became increasingly modern during the nineteenth century with the establishment of professional police forces and the emergence of professional district attorneys to supplant a system of private prosecutions. This modernization increased the incidence of plea bargaining.¹⁰⁰ As this practice gradually gained increased acceptance, docket management and

97. *Id.* The clear implication of the court's language was that it would not have accepted a guilty plea that was the product of bargaining or of any other sort of inducement. Only when it satisfied itself that the plea had not been induced by third parties, did the court accept the plea. See Alschuler, *supra* note 90, at 11-12; Wishingrad, *supra* note 90, at 514-15.

98. Allen Steinberg has found that in Philadelphia's criminal courts in the 1840s and 1850s, defendants pleading guilty to charges of assault and battery or larceny received a considerable sentencing advantage over their counterparts who were convicted after pleading not guilty. See STEINBERG, *supra* note 90, at 66, 67 n.26, 75-76. Theodore Ferdinand, however, has not found comparable results in Boston courts, absent a plea bargain, although he speculates that many defendants may have pled guilty with the expectation, or at least hope, of receiving some sentencing benefit. See FERDINAND, *supra* note 90, at 53. George Fisher has found similar leniency in late eighteenth century England for defendants who pled guilty. See Fisher, *supra* note 91, at 1276. In the records he studied, half of those convicted of larceny after trial were sentenced to transportation to America or Australia, while none of those who pled guilty were sentenced to transportation. See *id.* Alschuler and others describe this practice of "sentencing defendants who plead guilty less severely than defendants who are convicted at jury trials" as implicit plea bargaining. Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 471 (1988) [hereinafter Alschuler, *Departures and Plea Agreements*].

99. For an example in the British context, see Fisher, *supra* note 91, at 1276.

100. See FERDINAND, *supra* note 90, at 53-98; STEINBERG, *supra* note 90, at 230-31; Haller, *supra* note 90, at 189-93.

quick disposition of cases joined with the beliefs that penitence marked the beginning of rehabilitation and that the penitent defendant deserved leniency as rationales supporting favorable treatment for defendants who plead guilty. Studies of sentencing practices in the more recent past have shown that judges continue to reward apparently contrite defendants, and especially those who plead guilty, with sentence leniency.¹⁰¹ A survey conducted in the 1950s of 140 of the then 240 federal district court judges, as well as nine of Connecticut's twenty superior court judges, revealed that most responding judges rewarded guilty pleas with sentence leniency.¹⁰² The judges typically justified their practice by asserting that defendants who pled guilty manifested a repentant attitude, which was "an important step toward rehabilitation."¹⁰³ Yet nearly as many judges acknowledged that sentence leniency was also a reward for defendants whose guilty pleas spared the government the expense of trial and had helped to clear crowded court dockets.¹⁰⁴ More recent interviews with judges regarding sentencing practices for white-collar crimes established that contrition and cooperation remained important factors in the determination of sentences and that judges looked beyond the plea to consider the authenticity and extent of contrition and the degree and value of assistance offered to the prosecutor.¹⁰⁵

101. See MODEL SENTENCING ACT § 1.8(a)(ii) (National Council on Crime & Delinquency, 2d ed. 1972), reprinted in GEORGE H. REVELLE, SENTENCING AND PROBATION 214-17 (1973); see also, e.g., STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 115-20 (1988) (recounting stories of judges who were moved by defendants' remorse and cooperation); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987) [hereinafter U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT] (noting that "cases in which guilty pleas are entered result on average in considerably lower sentences").

102. See Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206-07 (1956) [hereinafter *Yale Survey*] (noting that of the 140 district court judges who responded, 66% considered the defendant's plea to be relevant in sentencing and, of those 66% of judges, 87% indicated that a guilty plea results in a more lenient sentence. The Note further indicated that of the nine state judges who responded, eight considered the defendant's plea to be germane to sentencing).

103. *Id.* at 209-10.

104. See *id.* at 219-20.

105. See WHEELER ET AL., *supra* note 101, at 115-20. While the earlier survey was framed in such a way as to focus on the defendant's plea, there's little reason to believe that the participating judges were any less likely than those questioned in the white-collar sentencing study to attempt to discriminate between real and feigned repentance. Indeed, the respondents to the Yale study noted that a guilty plea was only one of the many factors that they took into consideration, and that its weight varied from case to case. See *Yale Survey*, *supra* note 100, at 207 n.19.

This practice of rewarding remorseful defendants has been formalized and, to some extent, regularized in the Federal Sentencing Guidelines (the Guidelines). The Guidelines were promulgated by the United States Sentencing Commission and given the force of law pursuant to the Sentencing Reform Act of 1984.¹⁰⁶ Under the Guidelines, federal district courts plot the defendant's offense level on the vertical axis and his "criminal history points" on the horizontal axis; the resulting coordinates establish a sentencing range.¹⁰⁷ As part of the process of determining the defendant's offense level the sentencing judge considers whether or not the defendant has accepted responsibility for his offense. Guidelines Section 3E1.1(a) instructs, "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."¹⁰⁸ Under the Guidelines a two-step reduction in offense level may make a significant difference in the defendant's sentence.¹⁰⁹ For example, a defendant convicted of armed bank robbery would, absent other enhancements or reductions, have an offense level of 25.¹¹⁰ If the bank robber had no prior criminal history, the Guidelines prescribe a sentence of

106. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235(a)(1), 98 Stat. 1987, 2031-33 (codified as amended at 18 U.S.C. § 3661 (1994)).

107. Jon M. Sands & Cynthia A. Coates, *The Mikado's Object: The Tension Between Relevant Conduct and Acceptance of Responsibility in the Federal Sentencing Guidelines*, 23 ARIZ. ST. L.J. 61, 64-65 (1991). The process by which a sentencing judge must determine the appropriate offense level and criminal history points is far more complicated than the single sentence in the text suggests, but most of the intricacies of the Guidelines, other than the Guidelines' downward adjustment for "acceptance of responsibility," are beyond the scope of this Article. For discussions of the Guidelines generally and of many of its intricacies, see ROGER W. HAINES, JR. ET AL., *FEDERAL SENTENCING GUIDELINES HANDBOOK* (1994); THOMAS W. HUTCHINSON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* (2d ed. 1994).

108. U.S. SENTENCING COMM'N, *GUIDELINES MANUAL* § 3E1.1(a) (1995) [hereinafter *SENTENCING GUIDELINES MANUAL*]. Subsection (b) of Section 3E1.1 provides for an additional reduction of one offense level for any defendant who qualifies for a decrease under subsection (a), whose offense level is sixteen or greater and who has assisted authorities in the investigation or prosecution of his own misconduct by either: timely providing the government with complete information concerning his involvement in the offense, or timely notifying the authorities of his intention to plead guilty, thereby avoiding any preparation for a trial and saving prosecutorial and judicial resources. See *id.* § 3E1.1(b).

109. Generally the sentence discount will not be as big as the discount that a defendant would have garnered by offering a guilty plea in pre-Guideline days. According to the Sentencing Commission's study of then-current federal sentencing practices, the average sentence for someone who pled guilty was from 30 to 40% below that which a defendant convicted of the same crime after a trial would receive. Under the Guidelines the two-level reduction produces a sentence reduction of approximately 20%. See U.S. SENTENCING COMM'N, *SUPPLEMENTARY REPORT*, *supra* note 101, at 48-50; Alschuler, *Departures and Plea Agreements*, *supra* note 98, at 471.

110. See *United States v. Frierson*, 945 F.2d 650, 652 (3d Cir. 1991).

between 57 and 71 months, but a two-step reduction for acceptance of responsibility would reduce the sentence range to 46 to 57 months.¹¹¹

The availability of reduced sentences for those who accept responsibility, and the courts' considerable readiness to grant these reductions despite the overall stringency of the Guidelines, ensure that confessions remain commonplace in America.¹¹² Nevertheless, although most criminal defendants who seek a downward adjustment for acceptance of responsibility receive the adjustment, not every criminal defendant qualifies. An examination of decisions distinguishing deduction-worthy from unworthy, inauthentic contrition reveals much about modern norms and expectations regarding confession.

Guidelines Section 3E1.1(a) offers little guidance for the sentencing judge other than to indicate that the burden is on the defendant to demonstrate "clearly" his acceptance of responsibility.¹¹³ The accompanying application notes provide greater guidance, although, as note 5 indicates, the decision whether or not a defendant's acceptance of responsibility is authentic and adequate falls largely to the discretion of the sentencing judge.¹¹⁴ The notes indicate certain circumstances that will preclude or strongly militate against an adjustment. The Guidelines presuppose that in most instances the defen-

111. See SENTENCING GUIDELINES MANUAL, *supra* note 108, § 5A (sentencing table).

112. In 1995, 86.7% of all offenders received the acceptance of responsibility downward adjustment. See Phyllis J. Newton et al., *Gender, Individuality and the Federal Sentencing Guidelines*, 8 FED. SENT. REP. 148, 150 (1995). A survey conducted by the United States Court of Appeals for the Eighth Circuit in 1990 found that the downward adjustment for acceptance of responsibility was granted in 80% of cases where the defendant pleaded guilty. See *United States v. Knight*, 905 F.2d 189, 192, 194-95 (8th Cir. 1990). The other downward adjustments available under the Guidelines are for the defendant's "mitigating role" in the offense as a "minimal" or "minor" participant in the criminal activity, SENTENCING GUIDELINES MANUAL, *supra* note 108, § 3B1.2, and for the defendant's "super" acceptance of responsibility by "assist[ing] authorities in the investigation or prosecution of his own misconduct." *Id.* § 3E1.1(b).

113. See SENTENCING GUIDELINES MANUAL, *supra* note 108, § 3E1.1(a).

114. See *id.* § 3E1.1 application note 5. Courts of appeals have consistently applied a deferential standard of review with regard to the sentencing judge's evaluation of the authenticity and completeness of the defendant's contrition, under which the decision to grant or withhold the adjustment will only be set aside if clearly erroneous or without foundation. See, e.g., *United States v. Boots*, 80 F.3d 580, 594 (1st Cir.), *cert. denied*, 117 S. Ct. 263 (1996); *United States v. Dvorak*, 41 F.3d 1215, 1216 (7th Cir. 1994); *United States v. Morillo*, 8 F.3d 864, 871 (1st Cir. 1993); *United States v. Furlow*, 980 F.2d 476, 476 (8th Cir. 1992); *United States v. Camargo*, 908 F.2d 179, 185 (7th Cir. 1990); *United States v. Smith*, 905 F.2d 1296, 1301 (9th Cir. 1990); *United States v. Thomas*, 870 F.2d 174, 176 (5th Cir. 1989).

dant who seeks an adjustment will have pled guilty, and note 2 states that a defendant who denies factual elements of guilt, and only admits guilt and expresses remorse after conviction, is ineligible for an acceptance of responsibility adjustment.¹¹⁵ Not surprisingly, the Commissioners similarly found behavior that would merit sentence enhancement for obstructing or impeding justice to be generally inconsistent with acceptance of responsibility.¹¹⁶

Generally, entry of a guilty plea before trial and truthful admission of the conduct comprising the offense of conviction strongly indicate an acceptance of responsibility, but these two factors do not entitle the defendant to an adjustment as a matter of right; they may be outweighed by other evidence of a failure to accept responsibility.¹¹⁷ The notes also identify a number of factors that, while not necessarily dispositive either alone or in combination, nonetheless point toward a finding of acceptance of responsibility. Note 1 describes essentially three categories of behavior that militate in favor of an adjustment for acceptance of responsibility, especially if the defendant has acted in a timely manner: 1) truthful confession and other acts to assist authorities; 2) acts to stop the criminal conduct or to undo its consequences; and 3) acts to ensure against future misconduct.¹¹⁸ An

115. See SENTENCING GUIDELINES MANUAL, *supra* note 108, § 3E1.1 application note 2. The note adds, however, that there may be rare instances in which the defendant can manifest acceptance of responsibility despite a conviction at trial where the defendant had gone to trial to assert issues unrelated to his factual guilt, such as the constitutionality of the statute in question or the applicability of a statute to his conduct. See *id.* Even in these instances, however, the Commissioners cautioned against late conversion by stating that the determination of whether the defendant merited the adjustment should be based primarily on his pre-trial statements and deeds. See *id.*

116. See *id.* § 3E1.1 application note 3. The enhancement for obstructing or impeding justice is found in Section 3C1.1 of the Guidelines. The Guidelines originally stated that the downward adjustment would not be available whenever a defendant "perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice." *Id.* app. C, amend. 258. A 1989 amendment permits the adjustment in "extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." *Id.*

117. See *id.* § 3E1.1 application note 3.

118. Application note 1 states:

In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

- (a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under sec. 1B1.3 (Relevant Conduct). . . .
- (b) voluntary termination or withdrawal from criminal conduct or associations;
- (c) voluntary payment of restitution prior to adjudication of guilt;
- (d) voluntary surrender to authorities promptly after commission of the offense;

examination of the case law applying Section 3E1.1(a) gives a more complete picture of what it takes to make a meaningful and acceptable confession today.

In some instances the defendant's words or deeds clearly belie his or her assertions of remorse and acceptance of responsibility. Courts have denied the adjustment to defendants who: 1) continue to commit related crimes either after arrest from jail or while on release;¹¹⁹ 2) flee after arrest or conviction;¹²⁰ 3) destroy evidence or otherwise obstruct justice;¹²¹ 4) attempt to withdraw their guilty plea and assert their innocence;¹²² 5) retain a portion of the property they have stolen;¹²³ or 6) lie to their probation officer about assets avail-

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense;

(g) post-offense rehabilitative efforts (e.g. counseling or drug treatment); and

(h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Id. § 3E1.1 application note 1.

119. *See, e.g.*, *United States v. Carrington*, 96 F.3d 1, 9 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997) (denying adjustment in part because defendant continued crimes on release); *United States v. Snyder*, 913 F.2d 300, 301-02 (6th Cir. 1990) (denying adjustment to an incarcerated defendant who used a telephone to discuss the purchase of cocaine and was charged with conspiracy to possess cocaine for distribution); *United States v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990) (denying adjustment to defendant who continued to deal in cocaine after release on bond); *United States v. Jordan*, 890 F.2d 968, 974 (7th Cir. 1989) (denying adjustment to defendant who continued to deal in cocaine while on bail awaiting sentencing). *But see* *United States v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993) (holding that post-arrest misconduct unrelated to and dissimilar from charged offense need not be grounds for denial of adjustment).

120. *See, e.g.*, *United States v. Hawley*, 93 F.3d 682, 689-90 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1458 (1997) (holding that escape or violation of an appearance bond is evidence of failure to accept responsibility and thus a court can withhold a reduction); *United States v. Shinder*, 8 F.3d 633, 635 (8th Cir. 1993) (holding that flight after conviction and prior to sentencing was sufficient ground to deny the reduction for acceptance of responsibility).

121. *See, e.g.*, *United States v. Yusuff*, 96 F.3d 982, 988-89 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 999 (1997) (stating that lying at suppression hearing justified the refusal to grant a reduction); *United States v. Edwards*, 911 F.2d 1031, 1034 (5th Cir. 1990) (determining that a defendant's failure to notify authorities of a suspect's whereabouts constituted obstruction of justice). *But see* *United States v. Lallemand*, 989 F.2d 936, 938 (7th Cir. 1993) (holding that it was appropriate to adjust for acceptance of responsibility even though the court also found obstruction of justice).

122. *See* *United States v. Knight*, 96 F.3d 307, 310 (8th Cir. 1996) (affirming a district court finding that a defendant who moved to withdraw a guilty plea was not "accepting responsibility" for his actions and therefore did not qualify for sentence reduction).

123. *See* *United States v. Voyles*, 995 F.2d 91, 94 (6th Cir. 1993) (finding a defendant's failure to return a portion of stolen property to be a valid consideration in deciding not to reduce a sentence).

able for restitution.¹²⁴ Courts have been mindful of the possibility that a defendant who has “retain[ed] a lawyer who can help him craft a spiel,”¹²⁵ or who otherwise knows how to navigate the sentencing process, will obtain a reduction simply by “incanting the appropriate litany of remorse.”¹²⁶ Often, a sentencing judge has relied on defendant demeanor or other indications that the defendant is not sincerely remorseful.¹²⁷ In many of these cases the old saw that “late repentance is seldom true,”¹²⁸ seems to resonate strongly with sentencing judges; but unlike their Puritan counterparts, modern judges seem to demand that repentance be almost contemporaneous with the crime, rather than the product of a protracted communal struggle.¹²⁹

The acceptance of responsibility decisions illustrate that a defendant's assertions of remorse must be not only credible, but they must also be total, unqualified acknowledgments of personal failure and fault. The defendant will not receive a downward adjustment if she expresses her remorse selectively or attempts to minimize her role in the crime. For example, the United States Court of Appeals for the Tenth Circuit affirmed a sentencing decision withholding an adjustment from a defendant who said he was sorry that he had

124. See *United States v. Larsen*, 909 F.2d 1047, 1050 (7th Cir. 1990) (noting that intentionally lying to a probation officer about the amount of money available for restitution is a valid ground for finding that the defendant obstructed justice).

125. *United States v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1992).

126. *United States v. Speck*, 992 F.2d 860, 862 (8th Cir. 1993).

127. See, e.g., *United States v. Hall*, 952 F.2d 1170, 1172 (9th Cir. 1991) (approving district court's disbelief of defendant's professions of remorse); *United States v. Cruz*, 946 F.2d 122, 126 (11th Cir. 1991) (approving district court's denial of adjustment, despite a guilty plea, because the sentencing judge concluded that defendant “seems to be taking this in a rather light fashion today”); *United States v. Camargo*, 908 F.2d 179, 185 (7th Cir. 1990) (affirming denial of adjustment where the sentencing judge disbelieved sincerity of defendant's apology).

128. See *supra* note 52 and accompanying text.

129. See, e.g., *United States v. Wichmann*, 958 F.2d 240, 242 (8th Cir. 1992) (denying adjustment where defendant initially failed to appear at trial, though he subsequently pled guilty); *United States v. Apple*, 915 F.2d 899, 913 (4th Cir. 1990) (denying adjustment where defendant pled guilty only after his wife was convicted in separate trial and his own trial was imminent); *United States v. Casal*, 915 F.2d 1225, 1230 (8th Cir. 1990) (denying adjustment where defendant evaded arrest, but confessed once arrested); *United States v. Carroll*, 893 F.2d 1502, 1511-12 (6th Cir. 1990) (denying adjustment to defendant who waived indictment and pled guilty within two weeks of initial appearance on the complaint because “guilty plea in the face of almost certain conviction” does not signal genuine contrition); *United States v. Rios*, 893 F.2d 479, 480-81 (2d Cir. 1990) (denying adjustment where defendant waited until just before jury selection to plead guilty). But see *United States v. Hill*, 953 F.2d 461 (9th Cir. 1991) (holding that district court's granting of adjustment based on defendant's “11th hour” repentance was not clearly erroneous).

cheated individuals and small companies, but that “he felt no remorse over cheating large businesses.”¹³⁰ Defendants who have acknowledged only a portion of their wrongdoing, or who have refused to admit every element of the offense of conviction, have generally failed to win the adjustment.¹³¹ Similarly, defendants who admit responsibility but then understate either their role in the criminal enterprise or the gravity of their conduct have not received the adjustment.¹³²

Finally, sentencing judges have shown little patience with anything short of an unqualified acceptance of personal responsibility. Unlike seventeenth century conversion narratives, where a recitation of the genesis of the condemned’s sinfulness, complete with a discussion of the bad habits and bad company that the condemned had fallen prey to, was expected, modern statements by defendants who offer too much explanation of the sources of their misconduct are likely to be regarded by judges as attempts to evade responsibility.

130. *United States v. Whitehead*, 912 F.2d 448, 450-51 (10th Cir. 1990); *cf. United States v. McAlpine*, 32 F.3d 484, 485, 490 (10th Cir. 1994) (approving denial of adjustment to defendant who pled guilty to eight counts of mail fraud arising out of sales of interests in oil and gas leases and properties, where defendant characterized investors as sophisticated and investments as risky).

131. *See, e.g., McAlpine*, 32 F.3d at 485, 490 (refusing adjustment to defendant convicted of mail fraud in sales of interests in oil and gas leases and properties, where the defendant’s admission of fraud was limited to statement that the oil fields were inefficiently run and his accounting techniques were shoddy); *United States v. Kozinski*, 16 F.3d 795, 820 (7th Cir. 1994) (affirming a decision to deny adjustment when defendant “accepted responsibility only for little more than half of the conduct for which he was convicted and sentenced”); *United States v. Buss*, 928 F.2d 150, 151-52 (5th Cir. 1991) (denying adjustment where defendant denied knowing that it was illegal for an ex-felon to possess a weapon); *United States v. Head*, 927 F.2d 1361, 1374 (6th Cir. 1991) (agreeing with district court that defendant’s admission that he possessed cocaine base is inadequate under Section 3E1.1, where defendant is charged with and convicted of possession with intent to distribute); *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990) (refusing adjustment where defendant expressed regrets over results of his conduct, but never admitted having a fraudulent intent).

132. *See, e.g., United States v. Dvorak*, 41 F.3d 1215, 1217 (7th Cir. 1994) (approving the district court’s denial of adjustment for defendant who pleaded guilty to two counts of accepting bribes where sentencing judge found that defendant “rationalized his crimes as technicalities” in claiming that he would have done political favors for the people who gave him gifts even without the gifts); *United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993) (denying a reduction where the defendant tried to minimize his role in conspiracy and told the presentence investigator that “I’m a small-time hustler, not this”); *United States v. Chalkias*, 971 F.2d 1206, 1217 (6th Cir. 1992) (stating that court may withhold adjustment where the defendant understated her role in a drug conspiracy); *United States v. Shipley*, 963 F.2d 56, 58-60 (5th Cir. 1992) (approving refusal of adjustment where defendant admitted to crime but denied leadership role); *United States v. Smith*, 918 F.2d 664, 669 (6th Cir. 1990) (denying adjustment where the defendant failed to acknowledge leadership role in criminal undertaking).

Suggestions that others share responsibility or attempts to explain, and thereby partly to excuse, a defendant's conduct have met a chilly judicial reception.¹³³ Even attempts at self-improvement that address sources of the criminal conduct—alcoholism or drug addiction—without a proper measure of self-denunciation may not yield an acceptance of responsibility adjustment.¹³⁴

Defenses asserted by defendants that do not deny the charged conduct but otherwise deny legal responsibility also tend to undermine defendants' claims to have accepted responsibility. Typically, courts have regarded the entrapment defense as an effort to shift blame onto someone else, and thus the "antithesis of the acceptance of responsibility."¹³⁵ Defenses that assert a lack of *mens rea* have proven particularly troublesome. One defendant who relied on an

133. See, e.g., *McAlpine*, 32 F.3d at 490 (refusing adjustment where defendant diminished his own fault and attempted to shift blame to others); *United States v. Speck*, 992 F.2d 860, 863 (8th Cir. 1993) (refusing adjustment where defendant maintained his innocence and blamed others); *United States v. Reno*, 992 F.2d 739, 744-45 (7th Cir. 1993) (denying adjustment where defendant attributed criminal behavior to alcoholism and bad companions); *United States v. Shores*, 966 F.2d 1383, 1388 (11th Cir. 1992) (refusing adjustment where defendant "continued to blame his involvement on others"); *United States v. Salmon*, 944 F.2d 1106, 1127-28 (3d Cir. 1991) (refusing adjustment where defendant attributed criminal behavior to drug abuse and bad companions); *United States v. Baker*, 907 F.2d 53, 55 n.2 (8th Cir. 1990) (refusing adjustment where defendant stated that drug dealing was the only way she could support her children).

134. See *United States v. Curran*, 967 F.2d 5, 6-7 (1st Cir. 1992) (vacating and remanding, however, because of uncertainty about the district court's reasons for denying adjustment); *United States v. Pharr*, 916 F.2d 129, 131-32 (3d Cir. 1990) (reversing and remanding on other grounds and failing to reach the issue). But see *United States v. Big Crow*, 898 F.2d 1326, 1330 (8th Cir. 1990) (granting adjustment to defendant who acknowledged that drinking led to his loss of control and that he was responsible and sorry for the results and wished to refrain from future alcohol use despite statement that he was too drunk to remember the assault and doubted that he intended it). A 1992 amendment added application note 1(g), explicitly permitting courts to consider post-offense rehabilitative efforts. See SENTENCING GUIDELINES MANUAL, *supra* note 108, app. C, amend. 459.

135. *United States v. Demes*, 941 F.2d 220, 222 (3d Cir. 1991) (upholding denial of adjustment to defendant who raised an entrapment defense); see also, e.g., *United States v. Newson*, 46 F.3d 730, 734 (8th Cir. 1995) (upholding denial of adjustment where defendant sought to withdraw his guilty plea on the grounds that counsel had miscalculated an entrapment defense); *United States v. Emenogha*, 1 F.3d 473, 482 (7th Cir. 1993) (holding that entrapment defense precludes adjustment for acceptance of responsibility); *United States v. Villarreal*, 920 F.2d 1218, 1224 (5th Cir. 1991) (upholding denial of adjustment to defendant who told probation officer that he had been entrapped); *United States v. Cianscewski*, 894 F.2d 74, 83 (3d Cir. 1990) (upholding district court's finding that entrapment defense precludes adjustment). But see *United States v. Fleener*, 900 F.2d 914, 917-18 (6th Cir. 1990) (upholding grant of adjustment to defendant who raised entrapment defense to three of five counts in indictment where the defendant had been very cooperative with law enforcement officials).

insanity defense was held not to have accepted responsibility.¹³⁶ Another defendant who claimed that he lacked the necessary criminal intent for embezzlement due to his problems with drugs and alcohol was denied an adjustment by the sentencing judge.¹³⁷

Two Seventh Circuit decisions, *United States v. Beserra*¹³⁸ and *United States v. Reno*,¹³⁹ best illustrate the difficulty that defendants face in obtaining an acceptance of responsibility adjustment when they suggest deterministic explanations (or offer deterministic defenses such as the insanity defense) for their crimes. Jesus Beserra pled guilty to one count of conspiring to possess cocaine with the intent to distribute.¹⁴⁰ Addressing the court, Beserra said:

I made a terrible thing and involved myself and paid attention to the person that was the informant, and in those days I was drinking a lot and that is what drove me to do this, to pay attention to this person. And because of that I feel that I really beg your forgiveness.¹⁴¹

The district court judge denied Beserra's request for an acceptance of responsibility adjustment because he concluded that Beserra sought to shift the blame onto alcohol and bad companions.¹⁴² On appeal, the Seventh Circuit affirmed.¹⁴³

Writing for the Seventh Circuit, Judge Richard Posner acknowledged the dilemma faced by defendants and courts, exemplified by *Beserra*.¹⁴⁴ A statement like Beserra's might be a self-aware acknowledgment that capitulating to temptations such as alcohol can lead to trouble. As such, Beserra could be viewed as having accepted responsibility not merely by inartfully apologizing, but also by taking the necessary step toward "self-reform" of repudiating bad and de-

136. See *Reno*, 992 F.2d at 744-45.

137. See *Curran*, 967 F.2d at 6-7. On appeal the circuit court ruled that the court could withhold the adjustment if it determined on the basis of Curran's defense and the other evidence before it that he had not accepted responsibility for his criminal conduct. It also ruled, however, that the defense did not necessarily preclude a finding of acceptance of responsibility. Because the basis for the district court's decision was unclear, the circuit court vacated the sentence and remanded the case to the district court for clarification or further consideration. See *id.*

138. 967 F.2d 254 (7th Cir. 1992).

139. 992 F.2d 739 (7th Cir. 1993).

140. See *Beserra*, 967 F.2d at 255.

141. *Id.* Beserra made a similar statement to the probation officer who conducted his presentence investigation. See *id.*

142. See *id.*

143. See *id.* at 256.

144. See *id.* at 255-56.

structive habits. On the other hand, his statement might be regarded as an attempt to deny responsibility by blaming "demon alcohol and evil companions," instead of himself.¹⁴⁵ In this vein, Judge Posner likened Beserra to Hamlet, who "apologized to Laertes by saying that it was not Hamlet who had wronged him but Hamlet's madness."¹⁴⁶

The paradox of *Beserra* is that the defendant who has nothing more to say about his crime than: "I did it. I'm sorry," thereby acknowledging that he freely chose to do wrong, may fare better than the defendant who recognizes that he succumbed to particular temptations or extrinsic circumstances, even though "the defendant who has and makes no excuses—who takes full responsibility for his crime—confesses to being unable to point to anything that might mitigate his criminality."¹⁴⁷ Because the trial judge's factual finding that Beserra had not accepted responsibility was reversible only on a finding of clear error, the Seventh Circuit could decide the case without resolving the paradox, and concluded that the district court had not clearly erred in finding insufficient evidence of true remorse and acceptance of personal responsibility.¹⁴⁸

The second Seventh Circuit decision, *Reno*, stands in striking contrast to *Commonwealth v. Battis*, the early nineteenth century decision discussed above.¹⁴⁹ In *Battis*, the Massachusetts court had strenuously attempted to discourage a guilty plea, questioning whether a sane person would ever plead guilty to a capital offense.¹⁵⁰ *Reno*, by contrast, asked whether someone who is mentally ill and asserts an insanity defense could accept responsibility. Reno was convicted of bank robbery after a trial in which he had relied on an insanity defense.¹⁵¹ There was no question that Reno suffered from chronic paranoid schizophrenia.¹⁵² Nonetheless, the jury credited the government's psychiatric expert's testimony that Reno understood the wrongfulness of his conduct at the time of the robbery and therefore concluded that he was not legally insane.¹⁵³ As part of the pre-

145. *Id.* at 255.

146. *Id.*

147. *Id.* at 255-56.

148. *See id.* at 256.

149. *See supra* notes 93-97 and accompanying text.

150. *See id.*

151. *See* United States v. Reno, 992 F.2d 739, 741 (7th Cir. 1993).

152. *See id.*

153. *See id.*

sentence investigation Reno submitted a defendant's version of the offense, in which he apologized to the teller and to everyone involved in the case. He also wrote:

Now that I look back I know I was wrong and I am very ashamed because I could not control my illness and I am sorry I did not continue the treatment that was necessary to bring me back to reality. I understand now that the refusal to continue the treatment was part of my illness I was found guilty by a jury, and now an [sic] prepared to face the consequences for my actions.¹⁵⁴

The district court held that Reno had not accepted responsibility and was therefore not entitled to an adjustment.¹⁵⁵ In a thoughtful decision, Judge Zagel stated that a denial of responsibility in a legal sense, by an assertion of the insanity defense, was theoretically compatible with acceptance of responsibility in a moral sense.¹⁵⁶ The latter is all that Guidelines Section 3E1.1 requires.¹⁵⁷ Nevertheless, he interpreted Reno's statement as a denial of moral responsibility.¹⁵⁸ Judge Zagel stated that Reno "essentially blames what occurred on his illness, and I don't think that's acceptance of responsibility."¹⁵⁹ The decision failed to specify what a defendant like Reno would have to do to evince satisfactory acceptance of responsibility, and it suggests that, perhaps, the compatibility of an insanity defense and acceptance of responsibility under the Sentencing Guidelines is more theoretical than real. After *Bessera*, the Seventh Circuit held that the district court's factual determination that Reno had not accepted responsibility was not clearly erroneous.¹⁶⁰

What are the meanings and effects of today's enthusiasm for confession and the rituals and rules of adequate acceptance of responsibility? How have these meanings and effects changed from those of colonial New England?

For the defendant, acceptance of responsibility is one of the few available means to a shorter sentence. Typically, it is the mechanism through which a defendant receives the benefits of his plea bargain. Further, while the goals of deterrence, retribution, and incapacitation

154. *Id.* at 744.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *Id.*

160. *See id.* at 744-45.

seem to have supplanted rehabilitation as the primary purpose of punishment, the acceptance of responsibility provision reflects a residual belief that confession can help transform an individual beneficially, and indeed may be a necessary precondition for rehabilitation.¹⁶¹ Thus, for some defendants acceptance of responsibility may be "therapeutic confession."¹⁶² Yet for others it may be coerced self-denunciation, the lesser of two evils offered by the state. For others still, it is a cynical ritual, a series of empty words that must be recited as part of the criminal justice game.

Like the gallows speeches and conversion narratives of early New England, a defendant's acceptance of responsibility is produced within a social context and has social, as well as individual consequences. As shown above, a defendant must conform to rules and conventions of proper acceptance of responsibility to receive the adjustment.¹⁶³ Further, as an inducement to guilty pleas, the adjustment serves as a lubricant for the federal criminal justice system, allowing most cases to be resolved without trial.¹⁶⁴ But the differences between the two types of confessions are also striking. Given the secularization of our notions of crime, and the more limited application of the death penalty, the high drama of salvation or damnation is no longer center stage; it might not even be in the theater. Gone also is the broad communal participation in the drama of crime, repentance, and punishment. Reflecting both the movement away from criminal punishment as public spectacle and the professionalization of the criminal justice system, the broad public neither helps the defendant

161. Admittedly, one can reconcile the acceptance of responsibility provision with these other purposes of punishment, as well. The criminal defendant who has expressed genuine remorse appears to be a good candidate for a sentence reduction whether on a theory that the remorseful criminal deserves less severe punishment, or that having renounced his criminal ways he is less of a threat to society and therefore society can gamble on an earlier release, or because the practice of offering an acceptance of responsibility adjustment will encourage guilty pleas and cooperation with authorities.

162. The phrase is William Nelson's. Nelson applies the phrase to the different, but not unrelated practice of court-mandated participation in a group therapy or other counseling program as a condition of parole. See William A. Nelson, *The New Inquisition: State Compulsion of Therapeutic Confessions*, 20 VT. L. REV. 951, 952 (1996). Nelson defines therapeutic confession as "confession not to show evidence of guilt, but rather evidence of repentance or, in the modern phrase, amenability to treatment." *Id.* at 980.

163. See *supra* notes 101-62 and accompanying text.

164. This was also true of the practice of plea bargaining prior to the adoption of the Guidelines. The Sentencing Commission noted that approximately 85% of the pre-Guidelines federal convictions that it studied were the product of guilty pleas. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT, *supra* note 101, at 159.

along the path of repentance, nor comprises the audience for his profession of remorse. The adequacy of a criminal's acceptance of responsibility is no longer a question for the crowd on execution day. Instead, it is a matter for the probation officer who prepares the presentence report and the judge, or judges, with whom the ultimate decision resides. Indeed, the Guidelines as a whole seem to conceal questions of reform and desert from the public eye. My colleague Kevin McMunigal has observed that the Guidelines have reshaped the way that lawyers and judges talk about, and, consequently, perhaps the way they think about, sentencing. While the discourse of sentencing revolved in the past around such questions as the defendant's future dangerousness or capacity for rehabilitation, questions reflecting the competing purposes of punishment, it now focuses on the appropriate point on the grid on which to plot the defendant. The judge is likely simply to announce that having considered the presentence report and having taken into consideration the appropriate adjustments, including the Section 3E1.1 adjustment, the appropriate place on the grid is "x." The resulting discussion is similarly likely to be coded in the language of the grid. While traditional sentencing concerns are built into the Guidelines, through the use of such factors as the defendant's criminal history, the relationship between a debate over whether the defendant belongs in square 32 or 31 and historical notions of the purpose of punishment is likely to be lost on nearly everyone but the cognoscenti of the criminal bar.¹⁶⁵

In addition to the relatively hidden character of the modern criminal's acceptance of responsibility,¹⁶⁶ a different understanding of crime than that of colonial New Englanders contributes to an altered social meaning of acceptance of responsibility. Lacking the Puritans' theological understanding of our own capacity to act criminally, and possessing a far stronger fear of being the victim of crime than did the Puritans, we no longer identify with the criminal, either individually, or as a community. The defendant is perceived as a dangerous,

165. These comments are based upon conversations I had with my colleague Kevin McMunigal. I hasten to add that McMunigal's comments are based on his casual observations and not on a more systematic study. While I think my extrapolations are sound, any faulty generalization from those observations are the product of my lack of caution, not his.

166. This is broken occasionally by media accounts of particular trials, or by the selective revelations of Court TV. As a viewer of the nightly local news, I have the nonempirical, but strong, impression that two favorite tableaux of local broadcasters are the repentant convicted criminal's statement prior to sentencing, or the angry judge's denunciation of the unrepentant convicted criminal.

often racialized, Other.¹⁶⁷ Consequently, acceptance of responsibility has little to do with inclusion and reintegration into either a secular community or a community of saints, although some residue of this idea can be found in the sentence adjustment and its prerequisites of genuine remorse.

At their most removed from Puritan confessions, criminal statements of responsibility are empty incantations that must be recited before a federal criminal defendant can receive the reward for her guilty plea.¹⁶⁸ Under this view the Guidelines' acceptance of responsibility provision essentially regularizes and contains the pre-Guidelines' practice of rewarding guilty pleas. Its purpose is to foster prosecutorial and judicial economy. It also encourages defendants to assist police and prosecutors and efforts to make the victims of crime whole. The *Beserra* court captures this utilitarian understanding of the Guidelines' provision in stating:

The framers of the sentencing guidelines were not, we take it, addressing the metaphysics of human responsibility. No doubt they wanted to encourage the guilty to plead guilty in order to save the government and the judiciary the costs of trial, as well as to reward defendants for concrete acts of assistance or restitution.¹⁶⁹

Only secondarily does *Beserra* echo older themes of reform, although it recasts these in contemporary utilitarian terms.¹⁷⁰

One cannot deny the importance of these practical ends in the Guidelines' acceptance of responsibility scheme. Certainly, one of the Sentencing Commission's primary purposes in framing the acceptance of responsibility provision was to create an incentive for socially desired behavior. That a struggle over the soul of the accused is not in issue can be seen in the mechanical regularity with which the adjustment is granted.¹⁷¹ Yet, the Sentencing Commission clearly had more in mind than simply setting a standardized price for guilty pleas.

167. A notorious example is the Willie Horton ad in the 1988 presidential election.

168. Judge Alex Kozinski refers to this performance as a "mini-morality play" and a "self-flagellatory ritual." *United States v. Aichele*, 941 F.2d 761, 768, 770 (9th Cir. 1991) (Kozinski, J., dissenting).

169. *United States v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1992).

170. The court states that the framers of the Guidelines may have also wanted "to lighten the sentence of criminals in whom glimmerings of conscience could be discerned," because such criminals are "on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are." *Id.*

171. See *supra* note 112 and accompanying text.

Indeed, the Commission rejected a proposal to apply an automatic fixed sentence adjustment in every instance of a guilty plea partly, as its chairman has noted, because such an automatic discount without regard for the “circumstances of the offense or the defendant’s post-offense conduct . . . would result in unjustified windfalls in many cases,” and would be contrary to “the public’s perception of justice.”¹⁷² Moreover, even if the overwhelming majority of defendants receive the adjustment fairly automatically after making the appropriately penitent gestures, those cases that do find their way into the reporters tend to involve questions of the credibility and adequacy of the defendant’s penitence. At least in those cases that for one reason or another deviate from the routine, defendants, like colonial New England miscreants before them, are examined for “visible signs” that their “conversions” are authentic and complete.¹⁷³ An element of soul saving, or at least rehabilitation, still inheres in modern notions of criminal confession.

The unregenerate utilitarian might argue that I have read too much into the acceptance of responsibility provision. Acceptance of responsibility remains one of the last reserves of judicial discretion under the federal sentencing scheme. Perhaps, she would say, the Sentencing Commission rejected an automatic discount as a sop to district court judges. But it is hard to agree with the idea that the acceptance of responsibility provision is a sort of judicial rent extracted from the Sentencing Commission, and I have not encountered a flesh and blood unregenerate utilitarian, as opposed to an ideal-type one, who makes this argument. Moreover, to explain the provision this way begs the question. It does not explain why the Guidelines contain this particular holdout of judicial discretion. Nor does it explain why judges would make this area one of particular concern.

I have suggested above that confessions such as Esther Rodgers’s may have eased the consciences of everyone implicated in her punishment.¹⁷⁴ Sometimes, modern confession may have the same ef-

172. William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 191 (1988).

173. In *Bessera*, Judge Posner writes that judges should look first for “expiatory deeds” and only failing these, for evidence of conscience in a defendant’s professions. 967 F.2d at 256. “[W]e think,” he writes, “the [Guidelines’] Application Note is on the right track in emphasizing deeds over words—external, verifiable, expiatory acts over self-serving, unverifiable reports of interior mental states.” *Id.*

174. See *supra* note 70 and accompanying text.

fect. Certainly, in some cases prosecutors and judges must have mixed emotions about the fate of a criminal defendant. More important, I believe, is the role of acceptance of criminal responsibility in helping to provide a sense of order and purpose to the criminal justice system. While the ritual of confession no longer serves to legitimize civil authority and the criminal justice system for the public, perhaps it serves that role for many judges. Section 3E1.1 does more than restore to judges a measure of sentencing discretion. It also satisfies an intuitive sense of desert by enabling judges to differentiate between the redeemable and the unredeemable criminal. As discussed above, judges have long exercised the power to distinguish criminals in this way.¹⁷⁵ At least one survey of judges revealed that many believe that criminals who accept responsibility for their crimes are less likely to be repeat offenders than are those who do not accept responsibility,¹⁷⁶ and the Commission recognized this belief in framing the Guidelines.¹⁷⁷ Armed with this belief, judges may be inclined to regard defendants who accept responsibility as less of a threat to society, thus reducing the need for incarceration.

The notion that criminals who accept responsibility for their acts pose a lesser threat of recidivism reflects either a belief that the decision to confess is a marker of better people with stronger character, or that the act of confession, itself, is transformative (or both). In either case, the adjustment for acceptance of responsibility follows. Notwithstanding its birth in a statute that renounced rehabilitation as an appropriate purpose of imprisonment, the acceptance of responsibility provision reflects a belief that confession is good for the soul, even if that confession is coerced by the sentencing rules.¹⁷⁸ It also reflects a belief that criminals who accept responsibility deserve lesser punishment than those who do not. Perhaps this belief stems from

175. See *supra* Part I.B.

176. See *supra* notes 102-03 and accompanying text.

177. See U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT, *supra* note 101, at 50; Ellen M. Bryant, *Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269, 1274 (1995).

178. Congress, in creating the Sentencing Commission, also stated that: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. § 994(k) (1994); see also *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (stating that the Sentencing Reform Act "rejects imprisonment as a means of promoting rehabilitation"); *United States v. Braxton*, 903 F.2d 292, 296 (4th Cir. 1990) (holding that "rehabilitation is not a factor in the consideration of acceptance of responsibility" where the district court had denied an adjustment to a defendant who because of his emotional and mental limitations was unable to accept responsibility to the point of beginning the process of rehabilitation).

the assumption that someone who confronts honestly her wrongful behavior, rather than looking for excuses, has taken upon herself part of the task of punishment. Or, perhaps it stems from a sense that acceptance of responsibility, whether or not accompanied by cooperation with authorities or restitution, is an act of reparation.

The acceptance of responsibility adjustment engenders a final social consequence: it reinforces an ideology of desocialized individual choice and responsibility because it insists that crime is a product of individual character failure, and is wholly unrelated to social or other extrinsic circumstances.¹⁷⁹ Defendants who blame companions for leading them astray, who attribute their crimes to the effects of drug or alcohol addiction, or who explain their crimes as a result of desperate poverty, may have gained important insight into the causes of their behavior. Armed with this insight, a defendant may have begun the process of return to communal norms when she expresses remorse. Yet the defendant who dares to set her crimes in a social context of family, companions, neighborhood, or, heaven forbid, race, gender, or class, is likely to provoke the judge's ire and squander her chance at an acceptance of responsibility adjustment. The *Beserra* court, for example, characterizes such statements as self-pitying, and it contrasts "genuine remorse" with "indignation at being a victim of circumstances—of poverty or drink or a brutal upbringing or whatever else may have predisposed him to criminal activity."¹⁸⁰ Indeed, as the Seventh Circuit's *Reno* decision shows, statements that invoke a social context are not the only ones that will render the defendant ineligible for the adjustment.¹⁸¹ Otherwise genuine remorse accompanied by reference to an internal imperative that contributed

179. I am neither arguing that character will play no role in a person's crimes, nor that social circumstances excuse criminal acts. But granting both, I am arguing that by silencing explanations that go beyond a monocausal confession of defective character, the acceptance of responsibility law distorts our understanding of crime and contributes to a distorted ideology of atomistic human agency with overtones of Herbert Spencer and William Graham Sumner.

180. *United States v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1992). The court did, however, acknowledge the paradox that "the defendant who has and makes no excuses—who takes full responsibility for his crime—confesses to being unable to point to anything that might mitigate his criminality," and nevertheless that defendant, "who acknowledges having committed a crime because he chose freely to do so—being, at the time anyway, an evil person—[will] get a shorter sentence than a weak person who acknowledges having committed his crime out of weakness." *Id.* at 255-56. The court is clearly not fully at ease with its decision.

181. See *United States v. Reno*, 992 F.2d 739, 744-45 (7th Cir. 1993) (affirming the district court's decision not to adjust the defendant's sentence because, in the words of the district court, the defendant "did not and perhaps not even now accepts responsibility in the moral sense").

to the crime, here Reno's comment that his resistance to treatment (for which he apologized and felt shame) was part of the disease, can also be disqualifying.

The social consequence of acceptance of responsibility law extends beyond the outcomes in individual cases. It reinforces a worldview that suppresses social inquiry into the causes and meanings of crime, just as it tends to suppress part of the story that future Beserras and Renos have to tell, at least well-counseled ones. It distorts our understanding of our world, and undermines our will and our confidence to change it.

II. MCNAMARA'S CONFESSION

A. *The Confessors' Responses*

You fasten the triggers
For the others to fire
Then you set back and watch
When the death count gets higher
You hide in your mansion
As young people's blood
Flows out of their bodies
And is buried in the mud

...

How much do I know
To talk out of turn
You might say that I'm young
You might say I'm unlearned
But there's one thing I know
Though I'm younger than you
Even Jesus would never
Forgive what you do¹⁸²

The brothel echoes with the chime of bells—
you twist and turn in bed; then you wake up.
Your boat of love will cross the sea of lust;
your beauty's waves must reach the Dhyana grove.

Grab Wisdom's sword and cleanse your filthy heart;
tell Bodhi beads and weave your karmic fate.

182. BOB DYLAN, *Masters of War*, reprinted in LYRICS, 1968-1985 (1985).

Your temple's nice and cool, with moon and wind: no
 Buddha yet, you live a god's good life!¹⁸³

To understand the critical reaction to *In Retrospect*, it is useful to get a sense of how often and in what terms McNamara acknowledges his mistakes. Acknowledgments of mistakes and expressions of remorse dot the landscape of Robert McNamara's memoirs; the most notable among these is McNamara's overall assessment of America's venture in Vietnam: "we were wrong, terribly wrong."¹⁸⁴ This is the statement most frequently found in the press reports and commentaries discussing *In Retrospect*. Yet this statement hardly stands alone. Repeatedly, McNamara identifies instances of the flawed assumptions and analyses that he and others within the Kennedy and Johnson administrations made, their continued failure to confront the contradictions in those assumptions and to look beyond a narrow range of responses to events, and the lost opportunities that resulted. On a single page McNamara writes that "the foundations of our decision making were gravely flawed," as he and his associates "badly misread China's objectives;" "totally underestimated the nationalist aspect of Ho Chi Minh's movement;" "fail[ed] to consider China and Vietnam . . . as [they] did Yugoslavia—a Communist nation independent of Moscow;" accepted "ill-founded judgments . . . without debate;" and "failed to analyze [their] assumptions critically."¹⁸⁵

Throughout the book McNamara continues this tone of self-reproach and this catalogue of errors, a long list of "we misjudgeds" and "I should haves." It "shocks and saddens" McNamara that the U.S. became involved in the events that led to the overthrow and assassination of President Ngo Dinh Diem, without undertaking an analysis of whether we could win with Diem, without evaluating the alternatives to Diem, and without first taking appropriate measures

183. Huynh Man Dat, *The Old Whore Becomes a Nun*, in AN ANTHOLOGY OF VIETNAMESE POEMS FROM THE ELEVENTH THROUGH THE TWENTIETH CENTURIES 90-91 (Huynh Sanh Thong ed. & trans., 1996). Huynh Sanh Thong notes that Ton Tho Tuong (1825-1877) profited handsomely as a French collaborator. "In his old age, he wished to express repentance with a poem entitled 'The old whore becomes a nun.'" *Id.* at 91. Huynh Man Dat offered a biting reply in a poem of the same title. "Dhyana grove" refers to contemplation or meditation, and "Bodhi" to Buddhist enlightenment. The phrase "'moon and wind' . . . suggests illicit love." *Id.* Thong's translation and interpretation of Dat's poem is not beyond dispute. For an alternative view on the relationship between Dat's and Tuong's poems, see Electronic Mail message from Ming Quang, Dec. 14, 1997, on file with author.

184. McNAMARA, *supra* note 3, at xvi.

185. *Id.* at 33.

to attempt to make Diem "mend his ways."¹⁸⁶ A memo McNamara prepared early in President Johnson's administration, which McNamara believes reinforced Johnson's inclinations regarding Vietnam, was "limited and shallow" and left "basic questions . . . unexamined."¹⁸⁷ Repeatedly, he writes, he failed to press the military planners to examine their assumptions and to answer the hard questions regarding the costs and likelihood of success of U.S. efforts. Of a July 1965 meeting with General William Westmoreland, then commander of U.S. troops in Vietnam and a prime advocate for escalation of the war, McNamara writes:

I clearly erred by not forcing—a knock-down, drag-out debate over the loose assumptions, unasked questions, and thin analyses underlying our military strategy in Vietnam. I had spent twenty years as a manager identifying problems and forcing organizations—often against their will—to think deeply and realistically about alternative courses of action and their consequences. I doubt I will ever fully understand why I did not do so here.¹⁸⁸

When, in Senate hearings in February 1966, George Kennan realistically downplayed the China threat and noted that because of China's turn inward the American stake in Vietnam was greatly diminished, "Kennan's point failed to catch our attention."¹⁸⁹ Instead, "blinded by our assumptions," McNamara and the warmakers held to a "totally incorrect appraisal of the 'Chinese Threat'."¹⁹⁰

The litany continues. The failure to seek unambiguous Congressional authorization through a declaration of war "was certainly wrong."¹⁹¹ McNamara notes several lost opportunities to pursue a political solution. Diplomatic initiatives for peace were stillborn because McNamara and his colleagues found the necessary compromises unacceptable, or distrusted the messenger, or because the dip-

186. *Id.* at 55; *see also id.* at 70.

187. *Id.* at 107 (discussing Jan. 7, 1964, memorandum).

188. *Id.* at 203; *see also id.* at 108 ("It was our job to demand the answers. We did not press hard enough for them. And the chiefs did not volunteer them."); *id.* at 182 ("[W]e—and especially I, as secretary—should have been far more forceful in developing a military strategy and a long-term plan for the force structure required to carry it out."); *id.* at 243 (discussing his failure to force debate between Westmoreland and Marines on appropriate strategic approach in the field.).

189. *Id.* at 215.

190. *Id.* at 215, 219.

191. *Id.* at 128; *see also id.* at 191-92 ("[W]e chose to sweep the debate under the Oval Office carpet.").

lomatic moves coincided with undiplomatic stepped-up American military initiatives.¹⁹² After describing how the heaviest bombing of the war to date had derailed one diplomatic initiative, McNamara writes: "We failed miserably to integrate and coordinate our diplomatic and military actions."¹⁹³ McNamara also repeatedly decries their failure to consider withdrawal as a serious option.¹⁹⁴

Despite the many admissions of error contained in the book, most commentators and reviewers have deemed the book a failure, and found McNamara's confession to be inadequate at best.¹⁹⁵ To critics, McNamara's acceptance of responsibility and conversion have been no more complete than the "conversion" of Huynh Man Dat's old whore; McNamara is no worthier of forgiveness than Dylan's masters of war.¹⁹⁶

One can explain some of the reaction as merely a matter of renewing old battles and settling old scores. Yet there seems to be more at work here. An examination of the reaction can illuminate much not only about Robert McNamara and our unresolved relationship with the Vietnam War, but also about the role of public confession in modern life.

For some critics no confession could be adequate or appropriate. To them, McNamara is not entitled to a sense of resolution and inner peace, and he does not deserve the chance to rehabilitate his image or to try to influence future generations' opinions about him. Many of his critics believe that the harm McNamara wrought is simply too great to be excused by any confession. The *New York Times* scathingly editorialized that McNamara's "regret cannot be huge enough to balance the books for our dead soldiers What he took from

192. See, e.g., *id.* at 55, 62, 113-14 (discussing that although de Gaulle's stated objective in 1964 was neutralization, the absence of a substantive proposal led the U.S. to abandon the objective); *id.* at 247-52 (illustrating how the Ronning missions of spring 1966, the Marigold mission of fall/winter 1966, and the Sunflower mission of early 1967 were derailed because the U.S. continued to bomb Vietnam); *id.* at 295-302 (describing the thwarting of the Aubrac and Marcovich missions by continued U.S. bombing).

193. *Id.* at 299.

194. See *id.* at 63, 164, 320-21.

195. There have been some exceptions to the generally negative reaction. See, e.g., Editorial, *McNamara's Book*, COMMONWEAL, May 5, 1995, at 3, 3; Larry Maddry, *Don't Let Ire Obscure Message of McNamara*, VIRGINIAN-PILOT (Norfolk), July 8, 1995, at E1; *Regretting Vietnam*, CHRISTIAN SCI. MONITOR, Apr. 12, 1995, at 20.

196. See *supra* notes 182-83 and accompanying text.

them cannot be repaid by prime-time apology and stale tears, three decades late."¹⁹⁷

As the *New York Times* editorial suggests, for some critics McNamara's failure to voice his doubts about the war sooner compounds the enormity of his offense. Indeed, a common theme among many of the critics and commentators has been to condemn McNamara for failing to speak out on the war at a time when his voice might have made a difference.¹⁹⁸ "Now he tells us," writes both columnist Mary McGrory and Norfolk's *Virginian-Pilot*.¹⁹⁹ These critics invoke a laches-like bar. The time for your confession, they tell McNamara, has long past, and your self-recriminations will not now be entertained. The problem with McNamara's late confession is not so much that "late repentance is seldom true," although some critics do question his motive and sincerity.²⁰⁰ Rather, echoing both the Puritan tradition of criminal conversion²⁰¹ and the modern law of acceptance of responsibility,²⁰² the criticism reflects a belief that words alone are often insufficient markers of full repentance and acceptance of responsibility. One is obligated, instead, to *act* to undo as much of the harm as one can and to avert further harm. The emphasis here is on the healing and mitigating effects of confession, primarily for the community and for those especially injured. Having borne his doubts silently while the war still raged and his confession might have done some good, McNamara has forfeited his right to be heard.

197. *Mr. McNamara's War*, *supra* note 13. For similar expressions from across the political spectrum, see Richard Benedetto, *McNamara Doesn't Want Healing; He's Looking for Forgiveness*, GANNETT NEWS SERV., Apr. 21, 1995, available in LEXIS, News Library, Wires File; Bill Kaplan, *McNamara's 'Purgation' Isn't Enough*, WIS. STATE J., June 19, 1995, at 7A; Richard Reeves, *Confessions No Reason to Forgive*, FORT LAUDERDALE SUN SENTINEL, Apr. 18, 1995, at 9A; Zuzel, *supra* note 11, at A13.

198. For a representative sampling in addition to the *New York Times* editorial, see Drinan, *supra* note 8, at 24; James Fallows, *Morning Edition: Too Late to Say He's Sorry* (National Public Radio broadcast, Apr. 11, 1995), available at *Atlantic Unbound* (visited Jan. 27, 1998) <<http://www.agtnet.com/atlantic/atlweb/jf-npr/jf504-11.htm>>; Halberstam, *supra* note 5; Editorial, *'In Retrospect' Vietnam Confession*, ARIZ. REPUBLIC, Apr. 18, 1995, at B4; Kaus, *supra* note 12, at 6; Lucas, *supra* note 11; Mary McGrory, *McNamara's Book: Too Little, Too Late*, ST. LOUIS POST-DISPATCH, Apr. 17, 1995, at 7B; Editorial, *McNamara's Mea Culpa Is Too Late*, ALLENTOWN MORNING CALL, Apr. 16, 1995, at A14; *McNamara's Repentance*, TIKKUN, May 1995, at 6; Editorial, *Silence Is Sometimes a Lie*, ATLANTA J. & CONST., Apr. 17, 1995, at 8A; Editorial, *The Vietnam War: A Truth Too Late*, VIRGINIAN-PILOT (Norfolk), Apr. 13, 1995, at A14; Zuzel, *supra* note 11.

199. McGrory, *supra* note 198; *The Vietnam War: A Truth Too Late*, *supra* note 198.

200. See, e.g., Benedetto, *supra* note 197; Kaus, *supra* note 12, at 6; West, *supra* note 7.

201. See *supra* notes 47-53 and accompanying text.

202. See *United States v. Beserra*, 967 F.2d 254, 255 (7th Cir. 1992).

Indeed, for some, his confession is not only doomed to inefficacy, but causes injury anew. A *Time* reader wrote: "Shame on McNamara for trying to assuage his guilty conscience by making us share his pain. He should have been man enough to carry his guilt in silence."²⁰³ These critics fear that McNamara's admission that he sent American soldiers into battle despite his growing belief that the effort was a futile waste of lives will resurrect the grief of the families of those who died in Vietnam and will renew the pain of those who served and returned wounded in body or spirit.²⁰⁴ To even talk about the war is to reopen old wounds. But to suggest that it was anything other than a noble, though tragic undertaking, and certainly to suggest that at least one of the principal warmakers recognized that it was a senseless waste, would disturb the peace that those soldiers and their families had been able to make with their past. A major theme framing the press coverage of the book and McNamara's book tour was its impact on Vietnam veterans. Stories reported confrontations between veterans and McNamara, or veteran demonstrations at his speaking engagements and their calls for him to donate the proceeds of the book to veteran organizations.²⁰⁵ Newspapers reported an increase in the number of calls to veteran counseling centers in the wake of the book's release.²⁰⁶ Four brothers, all Vietnam veterans, filed suit against McNamara, alleging dereliction of his duty as Secre-

203. PAUL HENDRICKSON, *THE LIVING AND THE DEAD: ROBERT MCNAMARA AND FIVE LIVES OF A LOST WAR* 378 (1996) (quoting letter from Steve Altig to *Time* magazine, reprinted in *TIME*, May 15, 1995, at 6).

204. See, e.g., Benedetto, *supra* note 197; Fertel, *supra* note 6; Tim Gallagher, *McNamara's Unintended Message*, ROCKY MOUNTAIN NEWS (Denver), Apr. 27, 1995, at 49A; Ellen Goodman, *McNamara Exudes Sadness; Still Doesn't Get It*, IDAHO STATESMAN (Boise), May 7, 1995, at 19A; Lucas, *supra* note 11.

205. See, e.g., Mark Lasswell & Sarah Skolnik, *Aftershocks: A Mea Culpa from Robert McNamara, an Architect of the Vietnam War, Sets off an Angry, Anguished Debate*, PEOPLE, May 8, 1995, at 233; Catherine Walsh, *Robert McNamara Discusses His Book, 'In Retrospect: The Tragedy and Lessons of Vietnam,' at Harvard University*, AMERICA, May 20, 1995, at 9; Richard Benedetto, *McNamara Plans to Donate Book Profits*, USA TODAY, Apr. 20, 1995, at 9A; Jeffrey A. Berger, *In Retrospect: The Tragedies and Lessons of McNamara's Trip to Brown*, COLLEGE HILL INDEP. (visited Dec. 6, 1997) <<http://www.netSPACE.org/indy/issues/02-29-96/opinions3.html>>; Marc Fisher, *The No-Win Vietnam Memoir*, WASH. POST, Apr. 20, 1995, at D1 [hereinafter Fisher, *Memoir*]; Michael Hurd & Mike Kelley, *Still Split over Vietnam; Protesters Seek Apology; McNamara Reveals Little*, AUSTIN AM.-STATESMAN, May 2, 1995, at A1.

206. See Book Angers Veterans; *Counseling Calls Up over McNamara*, DAYTON DAILY NEWS, Apr. 18, 1995, at 3A.

tary of Defense and intentional infliction of emotional distress on all who served in Vietnam.²⁰⁷

For these sundry critics, McNamara's confession is untimely, either because he waived his right to be heard by failing to speak when it mattered, or because the hurt is still too strong for the Vietnam generation and their families to endure a dispassionate lecture on the "lessons of Vietnam." These critics ask him to "go away and shut up."²⁰⁸

Much of the criticism of *In Retrospect* echoes standards for confessions that should sound familiar by now. In exposing the book's flaws, the critics identify several earmarks of a good confession. An adequate public confession is offered in the spirit of humility and self-denunciation. It does not hold back self-scrutiny and self-revelation, but rather confronts and reveals all, including the most uncomfortable truths. And it accepts responsibility unhesitatingly and fully, without attempting to excuse, or justify, or to shift blame onto others. Applying these standards to McNamara, many critics find his confession wanting.

An adequate confession is complete and unqualified. In Puritan New England it flowed only after the sinner had reached a point of spiritual agony when she recognized the full horror of her sins. By contrast, many have viewed McNamara's confession as neither complete nor unqualified. He understates his responsibility for some decisions and events, they charge, and, at times, he is defensive when discussing his role in the war. While any memoirist is necessarily selective in his retelling of the past, McNamara sometimes appears bent on minimizing his fault by his choices of what to tell and what to omit. Moreover, he ignores or remains blind to much that he ought to address in a *mea culpa*. Writes Mickey Kaus, "it appears closer to

207. See Eduardo Montes, *Texas Brothers Sue McNamara for \$100 Million over Vietnam*, AUSTIN AM.-STATESMAN, May 16, 1995, at B2; see also Eduardo Montes, *Brothers in Arms; Despite Lawsuit, Siblings Say They'd Go to Vietnam Again*, AUSTIN AM.-STATESMAN, June 15, 1995, at B3. The brothers' suit was dismissed for failure of service of process. See HENDRICKSON, *supra* note 203, at 408.

208. John T. Correll, *The Confessions of Robert S. McNamara*, A.F. MAG., June 1995, at 2. In his commentary on National Public Radio, James Fallows said, "In the cycles of life, a desire to square accounts is natural, but Robert McNamara has forfeited his right to do so in public. You missed your chance, Mr. Secretary. It would have been better to go out silently[.]" Fallows, *supra* note 198, reprinted in *Atlantic Unbound*, *supra* note 198. For similar sentiments see Lucas, *supra* note 11; West, *supra* note 7; Zuzel, *supra* note 11.

a modified limited hangout than a *mea culpa*.”²⁰⁹ A few examples should suffice.

Though McNamara makes no claims of having been “out of the loop” as the decisions to escalate the war were made, his recitation of these events tends to underplay his role and to shift the onus onto the generals and the politicians threatening Lyndon Johnson and his Great Society from the right flank. The decisions to bomb North Vietnam, to send combat troops to Vietnam, to then alter their mission from a defensive to an offensive one, and to commit increasing numbers of men, were, according to McNamara, responses to this pressure by men whose greatest fault was their lack of imagination to question America’s containment policy or to find better solutions to the challenge of Vietnam.²¹⁰ In response to this effort to minimize responsibility, David Halberstam writes: “McNamara . . . wasn’t merely the loyal domestic policy servant he portrays himself to be in these pages. Publicly and privately, he was a fierce advocate of escalation, and for a time he became the driving force of the Vietnam War”²¹¹ John Correll, the editor-in-chief of *Air Force Magazine*, adds, “[McNamara] was not some star-crossed functionary who went passively along with a policy he opposed. He was so fiery an advocate that Vietnam became known as ‘McNamara’s War.’”²¹²

McNamara’s treatment of the question of his and the Johnson administration’s honesty with Congress and the American people about the war provoked considerable negative comment. He does recount a number of specific instances where the Johnson administration misled Congress or the press, and admits that at times he was “less than candid,” yet the overall impression that he gives is that with few exceptions his and the administration’s misstatements were inadvertent or dictated by military necessity.²¹³ On the Tonkin Gulf

209. Kaus, *supra* note 12, at 6. Kaus adds, “virtually every bit of inside information he divulges tends to make him look better rather than worse. He is constantly ‘disturbed’ and ‘troubled’ by the war. He highlights his own pessimistic memos (including one that, as Richard Reeves has pointed out, he never got around to showing to President Johnson).” *Id.*

210. See McNAMARA, *supra* note 3, at 320-24, 332-33.

211. Halberstam, *supra* note 5.

212. Correll, *supra* note 208, at 2.

213. McNamara, *supra* note 3, at 105 (describing statements to press after return from December 1963 trip to Vietnam). For instances of McNamara’s concession of his and the administration’s misleading statements or omissions, see, e.g., *id.* at 141 (stating that Dean Rusk misled Senator William Fulbright regarding Tonkin Gulf Resolution and Lyndon Johnson probably did as well); at 173 (administration authorizes regular bombing of North Vietnam but declines to inform public); at 179-80 (recounting McNamara’s and others’ misleading Congress-

incidents, he notes only one of his misstatements and testimonial omissions to Congress, which he describes as "honest but wrong."²¹⁴ By contrast, Edwin Moise, in his exhaustive study of the Tonkin Gulf incidents, describes the story told by McNamara and General Earle Wheeler, Chairman of the Joint Chiefs of Staff, in their briefing of key senators on the first incident, as "false in almost every detail."²¹⁵ McNamara adds, "[t]he fundamental issue of Tonkin Gulf involved not deception but, rather, misuse of power bestowed by the resolution."²¹⁶ Framing Tonkin Gulf in those terms, however, allows him to wriggle off the hook of responsibility. The decision to use the Tonkin Gulf resolution as an open-ended authorization rested with Johnson, and McNamara emphasizes his unsuccessful attempts to convince Johnson to seek further Congressional approval as the war heated up.²¹⁷ Elsewhere, he writes: "Dean [Rusk] and I, and our associates, gave frequent reports to Congress and the press. Were they accurate? They were meant to be. But with hindsight, the answer must be that the reports—including my own—on the military situation

sional testimony in days following April 1, 1965 decision to change role of U.S. forces in Vietnam from defensive one of base security to active combat mission); at 205-06 (decision to escalate made secretly). For examples of his excusing misstatements, see, e.g., *id.* at 47-48, 237 (blaming misstatements on South Vietnamese); at 105 (justifying lack of candor on military grounds); at 137 (attributing his misstatements to Congressional leaders regarding first Tonkin incident to honest mistakes). For other, unacknowledged instances of McNamara's misleading Congress and the American people regarding Vietnam, see *infra* note 222.

214. MCNAMARA, *supra* note 3, at 137. The asserted unprovoked North Vietnamese attacks on U.S. destroyers led to Congressional adoption of the Tonkin Gulf Resolution, which the Johnson administration came to read as an open-ended authorization for war. *See id.*

215. EDWIN E. MOISE, *TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR* 87 (1996). Moise notes that some of the deception may have resulted from Johnson administration concerns about revealing military secrets and that as to some of what he said, McNamara was himself misinformed, but Moise does not absolve McNamara of all of his misstatements then or now. *See id.* at 86-89.

216. MCNAMARA, *supra* note 3, at 142. He further argues that Congress understood that the resolution granted the broad warmaking powers that Johnson subsequently exercised, but that nonetheless the administration should not have used the resolution as a blank check. He argues that Congress had not believed that the administration would exercise such power without further consultation with Congress. *See id.* at 141-42. He additionally seeks to bolster his claim not to have willingly misled Congress by noting that in the February 1968 Senate hearings to reexamine Tonkin Gulf, Senator Fulbright "graciously absolved me of the charge of intentionally misleading Congress." *Id.* at 141. For a skeptical view on the legal significance of the administration's deception, and an equally skeptical view of later congressional claims that Congress was unaware of what the authorization entailed and how it might be used, see JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 15-26 (1993).

217. *See* MCNAMARA, *supra* note 3, at 200-01, 205-06.

were often too optimistic.”²¹⁸ Again, he admits error, but casts it as honest mistake, rather than duplicity. For this, incidentally, he holds the American military and State Department essentially blameless, and faults the South Vietnamese, instead.²¹⁹ He also writes: “None of us—not me, not the president, not Mac [McGeorge Bundy], nor Dean, nor Max [Maxwell Taylor]—was ever satisfied with the information we received from Vietnam.”²²⁰

This last quoted sentence prompted David Halberstam to write:

For McNamara to write so singularly dishonest a sentence 30 years after the escalation of the war, in a book heralded as a mea culpa, is, it seems to me, perilously close to a felony, and a sign that he is a man so contorted and so deep in his own unique self-delusion and self-division that he still doesn't know who he is and what he did at that time.²²¹

Others have similarly reminded us that the lies told by the administration and McNamara were deliberate and frequent.²²² It was not only in the heat of the moment (and when caution and deliberation would have mattered most) that McNamara banished all doubts about whether the second, and far more important, Tonkin Gulf incident had occurred, and neglected to tell Congress that there was reason to think that it had not.²²³ Years later, in other hearings before

218. *Id.* at 45-46.

219. *See id.* at 47-48.

220. *Id.* at 43. McGeorge Bundy was National Security Advisor during the Kennedy and part of the Johnson administrations. Maxwell Taylor served in various capacities during the Kennedy and Johnson administrations. He was first the Special Military Advisor and then the Chairman of the Joint Chiefs of Staff during the Kennedy administration; he then served as U.S. Ambassador to South Vietnam and as a close advisor to Johnson on Vietnam.

221. Halberstam, *supra* note 5.

222. Paul Hendrickson, for instance, notes a number of instances where *In Retrospect* is less than candid about McNamara's role in deceiving Congress, the press and the American people. *See* HENDRICKSON, *supra* note 203, at 163-66, 168-71, 283-84, 310-12, 325-26.

223. An attack on the U.S. destroyer Maddox did occur on August 2, 1964, *see* GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975*, at 133-35 (3d ed. 1996), under circumstances that McNamara was far “less than candid” in describing to Congress. *See supra* note 215 and accompanying text. The August 4th “incident” is now generally regarded (even by McNamara, although not at the time he wrote *In Retrospect*) as never having occurred. *See, e.g.*, MOÏSE, *supra* note 215, at 203-07; MARILYN B. YOUNG, *THE VIETNAM WARS 1945-1990*, 115 (1991) (describing the August 2 attack as “the first and only incident”). Regarding the August 4 incident, Moïse concludes: “the weight of the evidence is overwhelming: no attack occurred.” MOÏSE, *supra*, at 204. Whether the attack had occurred was called into question by Captain Herrick, the commander of the Maddox, shortly after it was reported. Captain Herrick reported that much of the evidence of the “attack” might have been attributable to “[f]reak weather effects on radar and overeager sonar men.”

Congress he would continue to brush aside any doubts, and to beat back Congressional questioning he would invoke the Pentagon's "unimpeachable," but undisclosable, proof of the second attack.²²⁴ In his study of the Tonkin Gulf incidents, Edwin Moïse characterizes much of McNamara's testimony in the Senate Foreign Relations Committee February 1968 hearings on the Tonkin Gulf incidents as "nonsense."²²⁵ Nevertheless, no longer referring to the by-then-discredited "unimpeachable" proof, McNamara asserts in *In Retrospect* that the second attack probably happened.²²⁶ His proof and conviction that there had been an attack would subsequently evaporate completely when, on a trip to Vietnam, McNamara credited General Vo Nguyen Giap's assurances that no second attack ever occurred.²²⁷

For some, *In Retrospect* smacked too much of the old bullying McNamara, who would face down the doubters and the challengers with unshakable self-confidence and a flurry of asserted facts, statistics and charts. The book inspired Martin Schram to recall McNamara's Thursday background briefings from 1967, a time long after McNamara had concluded that the war was unwinnable:

The "SecDef," with his trademark Harvard-honed countenance—rimless spectacles, square-jutting jaw, slicked-back hair—was at his trademark best: confident to the point of cocksure.

McNamara countered every question (Why is the enemy fighting so fiercely, year after year, if we are doing so well in Viet-

MCNAMARA, *supra* note 3, at 133. Within days of the supposed incident, many in the intelligence community and the military concluded that no second attack occurred, as, by some accounts, had President Johnson. See MOÏSE, *supra*, at 199, 241-43.

224. See James A. Nathan, *Robert McNamara's Vietnam Deception*, USA TODAY MAG., Sept. 1, 1995, at 32, 35.

225. MOÏSE, *supra* note 215, at 100.

226. See MCNAMARA, *supra* note 3, at 134; Nathan, *supra* note 224, at 32. Martin Schram writes of this tendency of McNamara's to dismiss all outward appearance of doubt and to dismiss likewise other people who doubted: "McNamara, when challenged, never seemed to have a doubt about the rectitude of his policy or his course; damn the reality torpedoes, full steam ahead." Martin Schram, *McNamara Puts to Paper the Arrogance of Power*, NEWSDAY, Apr. 14, 1995, at A36.

227. See Tim Larimer, *In Hanoi, A Look Back at a Vietnam War Flash Point*, N.Y. TIMES, Nov. 10, 1995, at A3; Keith B. Richburg, *Mission to Hanoi; McNamara Asks Ex-Foes to Join in Search for War's Lessons*, WASH. POST, Nov. 11, 1995, at A21. Even here a bit of autobiographical revisionism was apparently afoot. McNamara is reported to have stated that he found Giap's assurance that nothing had occurred on August 4, 1964, "very, very convincing" and that this confirmed his own suspicions. He added, "I am prepared to say, without a doubt there was no second attack." *Id.*; see also MCNAMARA, *supra* note 3, at xvii, 128.

nam?) with a rapid-fire barrage of certitude-by-the-numbers. More stats than a scribe could scribble, let alone verify. And that was the point. It was McNamara's not-so-secret plan to win his weekly war with the media. McNamara kept his opposition pinned down with his arsenal of statistics that proved beyond question that the war was being won (as we would see after the next monsoons).²²⁸

Other critics point to instances of McNamara's responsibility that *In Retrospect* simply ignores. McNamara, for instance, bemoans the absence of Far Eastern experts within the Kennedy and Johnson administrations (which he attributes with some justification to the McCarthy-era purge of Asian experts from the State Department), and he attributes his and his colleagues' failure to understand China and Vietnam and U.S. interests in Southeast Asia to the resulting lack of expertise. When the warmakers made mistakes, corrective voices were consequently nowhere to be heard.²²⁹ He makes no mention of his role in suppressing the dissenting voices that did exist within the administrations and in attacking and isolating those who had the temerity to question the assumptions and wisdom of the warmakers.²³⁰ McNamara identifies three moments when "we could

228. Schram, *supra* note 226. In *The Best and the Brightest*, David Halberstam recounts how McNamara would spring savage ambushes on George Ball in meetings with the President where Ball would advocate caution and McNamara argued for escalation. Halberstam writes:

McNamara was a ferocious fighter, statistics and force ratios came pouring out of him like a great uncapped faucet. He had total control of his facts and he was quick and nimble with them; there was never a man better with numbers, he could characterize enemy strength and movement and do it statistically.

Poor George had no counterfigures; he would talk in vague doubts, lacking these figures, and leave the meetings occasionally depressed and annoyed. Why did McNamara have such good figures? Why did McNamara have such good staff work and Ball such poor staff work? The next day Ball would angrily dispatch his staff to come up with the figures, to find out how McNamara had gotten them, and the staff would burrow away and occasionally find that one of the reasons that Ball did not have comparable figures was that they did not always exist. McNamara had invented them He believed in what he did, and thus the morality of it was assured, and everything else fell into place. It was all right to lie and dissemble for the right causes. It was part of service, loyalty to the President, not to the nation, not to colleagues, it was a very special bureaucratic-corporate definition of integrity; you could do almost anything you wanted as long as it served your superior.

DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 581 (3d ed. 1972).

229. See McNAMARA, *supra* note 3, at 32-33. For further discussion of this point see *infra* notes 250-54 and accompanying text.

230. See Thomas L. Hughes, *Experiencing McNamara*, FOREIGN POL'Y, Fall 1995, at 155, 165-66 (reviewing McNAMARA, *supra* note 3); Kaus, *supra* note 12, at 6; Louis Sarris, *McNamara's War, and Mine*, N.Y. TIMES, Sept. 5, 1995, at A17; Louis Sarris, *Weekend Edition—Saturday: Interview with Scott Simon* (National Public Radio broadcast, Sept. 9, 1995). In this regard see also HALBERSTAM, *supra* note 228, at 58 (recounting how McNamara would quash the dissenting voice of George Ball). For McNamara's response to Louis Sarris, see

and should have withdrawn from South Vietnam:" late 1963 after Diem's assassination; late 1964; and early 1965, as South Vietnam seemed on the verge of political and military collapse.²³¹ Thomas Hughes writes of these three moments: "As it happens, in each case analytical arguments were made and widely distributed, and in each case they were ignored or rejected. McNamara himself was front and center bringing all of his bloodless decisiveness to bear in snuffing out any incipient withdrawal temptations."²³²

Myra McPherson reminds her readers of two "scandals" of the Vietnam War that pass unnoticed in *In Retrospect*: Project 100,000, and the use of Agent Orange (and subsequent refusal to reveal known health risks of the toxin) as a defoliant in Vietnam.²³³ Project 100,000 was McNamara's plan to lower military enlistment requirements (they had already been lowered dramatically from pre-war levels) in an effort to recruit from the inner cities and poor rural areas 100,000 men per year who otherwise would have been ineligible for military service.²³⁴ The program lowered the minimum passing score on the armed forces qualification test from 31 out of 100 to 10 out of 100 for would-be recruits living in designated poverty areas.²³⁵ Billed as a Great Society uplift program, which promised education and training to these marginal recruits, the program in fact delivered little training to these men, dubbed the "moron corps" or "McNamara's boys," (McNamara, himself, called them the "subterranean poor") aside from the infantry training necessary to put them disproportionately in combat roles in Vietnam, and in body bags returning home.²³⁶ The Project further exacerbated the tendency of the selective service's class-biased channeling policy, which allowed for student deferments, medical exemptions that were widely available to those sufficiently well-informed and privileged to take advantage of them, and possible evasion by service in the reserves or

Robert McNamara, Letter to the Editor, N.Y. TIMES, Sept. 12, 1995, at A26. David Halberstam's account of the Sarris affair in *The Best and the Brightest* is consistent with Sarris' version in the *New York Times*, and with the more general characterization of McNamara as an accomplished bureaucratic infighter when it came to silencing dissenting voices. See HALBERSTAM, *supra* note 228, at 257-58.

231. MCNAMARA, *supra* note 3, at 320.

232. Hughes, *supra* note 230, at 159.

233. See Myra MacPherson, *McNamara's 'Other' Crimes: The Stories You Haven't Heard*, WASH. MONTHLY, June 1995, at 28.

234. See *id.*

235. See *id.*

236. See *id.* at 28-29.

National Guard, open to the savvy and the connected, to ensure that the war would be what Christian Appy has quite properly called a "working-class war."²³⁷

As Secretary of Defense, McNamara attended meetings where the health risks of Agent Orange were discussed, yet he remained silent as veterans sought help for health effects that might be the result of their exposures to the defoliant.²³⁸ McNamara's Defense Department had commissioned a study as early as 1967 which noted the "health dangers" of Agent Orange to human beings, yet in his book, McNamara remains silent about his knowledge of these toxic effects.²³⁹

Adherents of the revisionist view that the war was winnable if the civilians in Washington had not made the military "fight with one arm tied behind its back," fault McNamara for confessing the wrong sins.²⁴⁰ We were not "wrong, terribly wrong," to be in Vietnam, they contend. Rather, we were wrong to fight a war that we did not permit the military to win. In editorials, columns, letters to the editor, and traffic over the Internet, the civilian war managers, and espe-

237. CHRISTIAN G. APPY, *WORKING-CLASS WAR: AMERICAN COMBAT SOLDIERS AND VIETNAM* 11 (1993). On Project 100,000 and the other means by which the selective service law and practice turned the Vietnam-era military into a working-class military see *id.* at 11-38; LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, *CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION* 122-31 (1978). Appy notes that prior to 1965 men who scored in the bottom two categories of the military's mental examination (categories IV and V) were rarely accepted into the military. "Beginning in 1965, however, hundreds of thousands of category IV men were drafted. Most were from poor and broken families, 80 percent were high school dropouts, and half had IQs of less than eighty-five." APPY, *supra*, at 31. Rejection rates were slashed, falling from 50% in 1965 to 34% the following year. See *id.* at 32. Project 100,000 was designed to admit men who could not qualify even under these lowered standards. Appy notes:

The effect of Project 100,000 was dire. The promised training was never carried out. Of the 240,000 men inducted by Project 100,000 from 1966 to 1968, only 6 percent received additional training, and this amounted to little more than an effort to raise reading skills to a fifth grade level. Forty percent were trained for combat, compared with only 25 percent for all enlisted men. Also, while blacks comprised 10 percent of the entire military, they represented about 40 percent of the Project 100,000 soldiers. A 1970 Defense Department study estimates that roughly half of the almost 400,000 men who entered the military under Project 100,000 were sent to Vietnam. These men had a death rate twice as high as American forces as a whole. This was a Great Society program that was quite literally shot down on the battlefields of Vietnam.

Id. at 32-33.

238. See MacPherson, *supra* note 233, at 29.

239. *Id.* (quoting Judge George Pratt, Jr.'s comments on evidence discovered in Vietnam veterans' lawsuit against Dow Chemical for conspiring to hide the truth about dioxin).

240. *The Vietnam War; A Truth Too Late*, *supra* note 198. Representative works in this revisionist tradition are GEN. BRUCE PALMER, JR., *THE 25-YEAR WAR* (1984); COL. HARRY G. SUMMERS, JR., *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* (1982).

cially McNamara, have been condemned for their "micromanagement" of the war, their unwillingness to let the military experts do what they were trained to do, and their insistence on a limited war.²⁴¹ *In Retrospect*, they argue, is further proof that McNamara's heart was not in the effort, and that his timidity led to defeat.

An enduring measure of the adequacy of a person's confession has been his willingness to accept personal responsibility without shifting the blame onto others, or onto circumstances that excuse or mitigate his act. Both in Puritan New England and under the Sentencing Guidelines, failure to accept complete personal responsibility has been fatal to claims of penitence.²⁴² Perhaps the biggest gap in McNamara's confession is his failure to recognize those who were harmed most by his acts: the rank and file servicemen and the Vietnamese. Each gets scant notice, and some of McNamara's critics take him to task for one or both of these omissions.²⁴³ They see McNamara's confession as a manipulative effort simultaneously to garner the accolades due an unrelentingly honest and self-critical penitent and to soften the self-inflicted sting of confession. He seeks the communal adulation of an Esther Rodgers at the gallows, without having to ascend the gallows steps.²⁴⁴

241. See, e.g., Gen. Robert W. Bazley (Ret.), Letter to the Editor, A.F. MAG., Sept. 1995, at 9; Correll, *supra* note 205, at 2; Fisher, *Memoir*, *supra* note 205; Kolbe, *supra* note 7; Col. Felix Kozaczka (Ret.), Letter to the Editor, A.F. MAG., Sept. 1995, at 9; Darrell R. Schreiber, *Feeble Try at Self-Exoneration*, TIMES-PICAYUNE (New Orleans), May 29, 1995, at B4; Ann Sheridan, Letter to the Editor, WASH. TIMES, Apr. 30, 1995, at B2; Col. Larry C. Souder (Ret.), Letter to the Editor, A.F. MAG., Sept. 1995, at 9; see also *supra* notes 12-14 and accompanying text.

242. Recall Increase Mather's warning to the two convicted murderers who each claimed that the other struck the fatal blow. See *supra* text accompanying note 53; see also *supra* notes 133-34 (noting the hostility of modern judges applying the Sentencing Guidelines to defendants who attempt to excuse their behavior or shift a portion of the blame onto others).

243. See, e.g., Leonard Bushkoff, *Robert McNamara Faces History and Himself on Vietnam After Decades of Silence*, CHRISTIAN SCI. MONITOR, Apr. 17, 1995, at 13 (book review) (noting McNamara's seeming lack of interest in Vietnam, its society, and its politics); Correll, *supra* note 208, at 2 ("In the entire book, there are just four brief instances, one of them in a footnote, when the troops cross his mind."); Fertel, *supra* note 6; Harry Maurer, *McNamara Speaks—But Still Doesn't See*, BUSINESS WK., May 1, 1995, at 19 (book review); Richard Reeves, *War Stories: Robert McNamara Comes Clean on Vietnam*, WASH. MONTHLY, Apr. 1995, at 52 (book review). For further discussion of these omissions, see *infra* text accompanying notes 269-71.

244. Mickey Kaus captures this spirit in his book review, in which he notes that the inside information that McNamara's book reveals tends to cast McNamara as "disturbed" and "troubled" by the war. Kaus is a voice of restraint and caution. See Kaus, *supra* note 12, at 6.

In a review dripping with acid (in which he likens McNamara to Hitler's arms minister Albert Speer), Victor Gold accuses McNamara of a "postmodern" confessional two-step: "first, *mea culpa* and get the PR benefits thereof; then, let it be known that there were exculpatory circumstances."²⁴⁵ Gold notes that McNamara assigns blame widely: to Eisenhower, for leaving the Indochina mess and the domino theory to Kennedy and for counseling Johnson to hang tough and even use nuclear weapons, if necessary; to Joe McCarthy, for causing the purge of East Asian experts from government leaving the Kennedy and Johnson administrations operating, in McNamara's words, in "a region that was terra incognita;"²⁴⁶ to Barry Goldwater, for forcing Johnson to be more bellicose during the 1964 presidential campaign; and to the Joint Chiefs of Staff and their congressional hawk allies, for wanting to "bomb Hanoi back to the Stone Age" despite McNamara's cautionary advice.²⁴⁷

Some of the criticism in this regard makes unreasonable demands of McNamara. Echoing the general insistence under the Sentencing Guidelines that the defendant accept full responsibility personally, some critics fault McNamara for sharing the blame with his fellow policymakers. Martin Schram contemptuously calls *In Retrospect* a "we-a-culpa."²⁴⁸ Of course, notwithstanding McNamara's role as a major architect of the war, Vietnam was a collective effort and any honest effort on McNamara's part to document and explain the decisionmaking for intervention and escalation would reflect this collective character. Indeed, had he really done what Schram appears to ask of him, Schram and others would have accused him of displaying the famous McNamara arrogance.²⁴⁹

McNamara's "lack of expertise" excuse merits some discussion. McNamara correctly states that the Kennedy and Johnson administrations lacked China and East Asia experts of the same stature of Llewellyn Thompson, Charles Bohlen, and George Kennan, the So-

245. Gold, *supra* note 7, at 67.

246. McNAMARA, *supra* note 3, at 32.

247. Gold, *supra* note 7, at 67.

248. Schram, *supra* note 226; see also Zuzel, *supra* note 11 ("[Y]ou are being modest when you say, as you did in a radio interview last weekend, that 'we were terribly wrong' about Vietnam. In fact, Mr. McNamara, it was you. You were terribly wrong. We didn't call it 'McNamara's War' for nothing.").

249. Schram accuses him of the sin of arrogance, partially because Schram thinks he has not acknowledged sufficient individual responsibility. Sometimes one is damned regardless of his choices. For further discussion of McNamara's inability to curb his arrogance in *In Retrospect*, see *supra* notes 221-24 and accompanying text.

viet experts whom President Kennedy was able to turn to during the Cuban Missile Crisis.²⁵⁰ And he properly attributes this vacuum to the McCarthy-era purges of the China experts held responsible for "losing" that country. Nevertheless, he has overstated the unavailability of expertise in a manner that not only smacks of apologia, but also reveals the persistence of other character traits that undermine the effectiveness of his confession. At the cabinet and sub-cabinet level were Secretary of State Dean Rusk, who had served as Truman's Assistant Secretary of State for the Far East and was then viewed as a China expert, Under Secretary of State George Ball, who, as counsel to the French embassy during the French war in Vietnam, was intimately aware of the dangers of intervention, and Kennedy's first Under Secretary of State, Chester Bowles, who had served as ambassador to India.²⁵¹ Does McNamara really believe that the lack of East Asian expertise around the cabinet table and at the most senior levels within the State Department meant that no such expertise was available? What he failed to appreciate then, and apparently now, is that the grey eminences of foreign policy do not hold a monopoly on either knowledge or wisdom. Yet, voices of caution and dissent from within the administration and the military were squelched or ignored and their owners often punished.²⁵² Those from outside of government were similarly ignored when they were not ridiculed and villainized.²⁵³

Here we see McNamara's characteristic arrogance shine through the contrition. For McNamara, real expertise can only be found at the upper reaches of the foreign policy hierarchy where the best and the brightest reside. In fact, however, both within and without government, others had little trouble figuring out that our intervention

250. See McNAMARA, *supra* note 3, at 32.

251. See HALBERSTAM, *supra* note 228, at 35 (Bowles); *id.* at 173-75 (Ball); *id.* at 321-30 (Rusk); McNAMARA, *supra* note 3, at 156-58 (discussing George Ball). For a discussion of Bowles and his concerns regarding America's involvement in Vietnam, see also DAVID BURNER & THOMAS R. WEST, *THE TORCH IS PASSED: THE KENNEDY BROTHERS AND AMERICAN LIBERALISM* 103-04 (1984); HERRING, *supra* note 223, at 90-91.

252. See Fertel, *supra* note 6 (mentioning John Paul Vann, a colonel whose in-country reporting could have "seriously controverted the overly optimistic position [of] the defense department"); Herring, *supra* note 4, at 153 ("Even the available expertise was difficult to get to the top. And when it got to the top, such as State Department official Paul Kattenburg's criticism in the Kennedy years, it was ignored."); Hughes, *supra* note 230, at 164 ("The real-life effect of McNamara on the bureaucracy was regularly one of intimidation, hobbling if not silencing those in government who were prescient on Vietnam."); *Mr. McNamara's War*, *supra* note 13; see also *supra* notes 230-32 and accompanying text.

253. See Kaplan, *supra* note 197; *Mr. McNamara's War*, *supra* note 13.

was wrong, both in the strategic terms to which McNamara limits his confession, and, more importantly, in moral terms.²⁵⁴ This arrogance and elitism comes through also in McNamara's discussions of antiwar protesters and the peace movement. He writes of the protests he encountered as he garnered honorary degrees in 1966:

What disturbed me most during my campus visits was the realization that opposition to the administration's Vietnam policy increased with the institution's prestige and the educational attainment of its students. At Amherst, those protesting my presence wore arm-bands. I counted the number and calculated the percentage of protesters in each of four groups: graduates, cum laude graduates, magna cum laude graduates, and summa cum laude graduates. To my consternation, the percentages rose with the level of academic distinction. Some of the largest and most intense campus demonstrations occurred at premier institutions such as Berkeley and Stanford.²⁵⁵

In response, Murray Kempton writes: "For McNamara then and perhaps still the judgments of his fellow creatures exist to be accepted or dismissed according to the scale of the Preliminary Scholastic Aptitude Text."²⁵⁶ A particularly ugly moment in the book is McNamara's derisive characterization of the antiwar protesters at the October 1967 march on the Pentagon, and his suggestion that he could have organized a more effective demonstration: one in which more "disciplined-Gandhi-like" protesters would have succeeded in shutting down the Pentagon.²⁵⁷ In place of the humility that Puritan divines looked for in the penitent criminal, we see the McNamara who is driven to show that he is smarter than his critics.

254. Leonard Bushkoff writes: "If expertise mattered so much, how could such obvious amateurs as, for example, Robert Lowell, I.F. Stone, or the New York Review of Books get it right as early as 1965, while McNamara and the other best and brightest continued to get it wrong?" Bushkoff, *supra* note 243, at 13.

255. McNAMARA, *supra* note 3, at 253-54.

256. Murray Kempton, *When "Smart" People Wage War*, NEWSDAY, Apr. 16, 1995, at A29.

257. McNAMARA, *supra* note 3, at 303-05. In an interview with Paul Hendrickson discussing the same protest the lack of humility shines through more brightly:

'They did it all wrong . . . The way to have done it would to have been Gandhi-like. Had they retained their discipline, they could have achieved their ends. My God, if fifty thousand people had been disciplined and I had been the leader I absolutely guarantee you I could have shut down the whole goddamn place. You see, they didn't set up proper procedures for maximizing the force of the day.'

HENDRICKSON, *supra* note 203, at 300. For additional critical reaction to this discussion, see Kaus, *supra* note 12.

Remorseful words alone were not sufficient in Puritan New England, as they often do not suffice under the Sentencing Guidelines. Esther Rodgers and other penitents were expected to show "the truth of repentance" through their humble embrace of punishment and other acts of willing cooperation with authorities.²⁵⁸ Similarly, courts have declined to grant the acceptance of responsibility adjustment when the defendant behaves inconsistently with his asserted remorse. *In Retrospect's* critics complain that McNamara fails to demonstrate the truth of repentance. They find him lacking in humility, and hold extraordinary his attempt to position himself as a rehabilitated elder statesman teaching as profundities "lessons" that others had learned long ago.²⁵⁹ Many are agog at McNamara's surprise during his book promotion tour that his audience came not to ask him about the lessons of Vietnam or nuclear disarmament, but to confront him with their pain or to press him to enough self-revelation that they might catch a glimpse of the truth of his repentance.²⁶⁰

The pervasive sense that words alone do not suffice, at least at this late hour, underlies the most common reaction to the book. The notion that the penitent must do more than confess, but must in fact help to mitigate the harm that she has done, can be found both in the conventions of the criminal conversion narratives and in the decisions explicating the Sentencing Guidelines. This notion is echoed by the critical consensus that McNamara is too late. Why, the critics ask, did McNamara keep silent as the war ground on, as lives were lost or damaged on both sides and as two nations (more, really) suffered the consequences, each in its own way, of a wrong war?²⁶¹

B. The Meaning of McNamara's Confession

What is there to have pangs of conscience at night about with Vietnam?²⁶²

258. See *supra* notes 48-50 and accompanying text.

259. See, e.g., Correll, *supra* note 208, at 2; Fertel, *supra* note 6; Editorial, "McNamara's War" Was Aptly Named, PHOENIX GAZETTE, Apr. 12, 1995, at B4; Reeves, *supra* note 243, at 54.

260. See, e.g., Goodman, *supra* note 204.

261. See Drinan, *supra* note 8, at 24; *Guilt, with an Explanation*, NEWSDAY, Apr. 16, 1995, at A31; Halberstam, *supra* note 5; and sources cited *supra* note 198.

262. *Kissinger Interview with Theo Sommer*, DIE ZEIT, July 2, 1976, quoted in WILLIAM SHAWCROSS, SIDESHOW: KISSINGER, NIXON AND THE DESTRUCTION OF CAMBODIA 394 (1981). This quotation was brought to my attention by ELY, *supra* note 216, at 12. Normally, I

O how hard it is to Repent. . . . Oh! Turn whilst the Day of Grace
lasts.²⁶³

Qui s'accuse s'excuse.²⁶⁴

So what do Robert McNamara and Esther Rodgers have in common besides the blood of innocents on their hands? Both have admitted wrongs. There can be little doubt that McNamara has suffered real anguish over his role and his mistakes. Yet few people consider McNamara a good prospect for sainthood.

It is hard to make an independent judgment about Esther Rodgers's repentance and conversion. We can only know as much as Rogers's volume tells us, and we should be careful to approach that account with skepticism. We know far more about McNamara and about the events that he recounts, and the conclusion is unavoidable that, despite all his agony and regret, *In Retrospect* is a dishonest book.

Alfred Kazin has described autobiography as an effort "to make one's own experience come out right."²⁶⁵ The impulse to cast one's self in the best possible light (or at least to soften one's self-criticism and preemptively deflect the criticism of others) and to try to correct the errors of one's life in the telling is inevitable, and much of this occurs unconsciously: McNamara displays these tendencies in *In Retrospect* in his understatement of his role as architect of the war, in the emphasis on his anguished, internal, and early dissent, in the book's portrayal of the power of the forces pressing for ever more escalation, wider and more massive bombing and greater military and diplomatic stridency as nearly irresistible, but held partly at bay by McNamara, and in its omissions and denials of disagreeable facts, only some of which are discussed above.

McNamara's narrative exemplifies the battle of memory against the messiness of the past. Confronted with a divided self, he constructs, instead, a simpler, coherent story that glosses over those divi-

would not filch someone else's opening quotation, but I doubt a more fitting one exists for my purposes here.

263. ROGERS, *supra* note 23, at 148 (quoting Esther Rodgers).

264. A French proverb, roughly translated as: "One who accuses himself, excuses himself." Peter Brooks, *Storytelling Without Fear? Confession in Law & Literature*, 8 YALE J.L. & HUMAN. 1, 14 (1996).

265. Alfred Kazin, *The Self as History: Reflections on Autobiography* (1979), reprinted in *THE AMERICAN AUTOBIOGRAPHY: A COLLECTION OF CRITICAL ESSAYS*, 31, 35 (Albert E. Stone ed., 1981).

sions. His exuberance about the war and about American power, his "organization man" loyalty to the president and concomitant willingness to attack critics of the organizational "consensus," and his commitment to a strategy of attrition, with its horrific consequences for the Vietnamese, coexisted with a growing doubt that led him to be at once a cautious (and for a long time closeted) dove and can-do hawk. As McNamara relates, his doubts emerged in late 1965 (when the die had already been cast—although not necessarily irretrievably) after the North Vietnamese fought more effectively and with greater force than anticipated in the battle of the Ia Drang Valley, thereby calling into question American assumptions about the war.²⁶⁶ Yet, having now resolved this division within himself in favor of McNamara the dove, he projects this victory back in time and thereby smoothes out the contradictions within himself and his past. Upon his return from Vietnam after the Ia Drang Valley battle, McNamara wrote his first of many pessimistic memoranda to the President. In it he outlined two options: a political compromise on fairly undesirable terms, or escalation of the air and land wars with even odds that it would produce nothing more than a stalemate at a higher level of engagement. McNamara writes of this November 30, 1965 memo that he "did not state a preference between these two unhappy options."²⁶⁷ This interpretation reflects McNamara's self-delusion in his effort to tame his past. He cannot seriously expect to fool anyone but himself on this matter, since George Herring had previously reviewed this document and revealed that, notwithstanding his doubts, McNamara did indeed advocate escalation in the memo as "the best chance of achieving our stated objectives."²⁶⁸

Indeed, biographer Deborah Shapley, who interviewed McNamara over twenty times during the late 1980s and early 1990s,

266. See McNAMARA, *supra* note 3, at 221-22. The American forces won a decisive victory, albeit with heavy casualties, but, as McNamara notes, the "North Vietnamese had chosen where, when, and how long to fight." They also inflicted heavy casualties and demonstrated that they were capable of raising a much greater force than anticipated. See *id.* For the most extensive discussion of McNamara as a man divided, see generally HENDRICKSON, *supra* note 203.

267. See McNAMARA, *supra* note 3, at 223.

268. George C. Herring, *The Strange "Dissent" of Robert S. McNamara*, in *THE VIETNAM WAR: VIETNAMESE AND AMERICAN PERSPECTIVES* 140, 142 (Jayne S. Werner & Luu Doan Huynh eds., 1993) (quoting Robert S. McNamara, Memorandum for the President (Nov. 30, 1965), Lyndon Baines Johnson Papers, Lyndon Baines Johnson Library, National Security File, Country File, Vietnam, Box 75).

found his dovish views to be far more inchoate as recently as 1993.²⁶⁹ She further notes that during her interviews he explained his failure to act more forcefully on his doubts about the war as the product of his uncertainty that his doubts were well-founded.²⁷⁰ He has paid a price for this projection of current conclusions onto his past in the heightened outrage over the contradiction between his apparent silent loss of faith in the war and his continued management of the war. Should the point be lost on any of his readers, he includes a chart that shows the troop levels and the number of Americans killed in action at various moments when we might have ended our involvement.²⁷¹

McNamara, ever the control freak, attempts to order this past with his usual tools: charts, statistics, and lists of lessons, as well as with an account that imposes order and banishes his ambivalences and contradictions, along with most of his feelings and emotions. Except for the rare anecdote or moment of insight where those feelings break through, this is a corpse-cold account. It is the triumph of intellect over emotion. Here he stands in striking contrast to Esther Rodgers, who felt her past and recounted it with an obvious intensity.

But McNamara is still divided. At times he is penitent, but at other moments he is defensive and apologetic. This division tends to manifest itself on the one hand in a genuine desire to figure out how and when mistakes were made. That is McNamara the analyst. But he still demonstrates the need to be smarter than everyone else, to bully and pulverize his critics, to always be right. Mickey Kaus notes the contradiction: "McNamara wants to both claim that he was right and get credit for admitting he was wrong."²⁷² Repeatedly, as McNamara recounts the extraordinary moral and strategic folly of his destructive war, he notes the dedication, brilliance, and other superb qualities of his colleagues (and by implication, of himself) who with him made the war.²⁷³ Missing from his discussion is any similar gen-

269. See Deborah Shapley, *McNamara's Inner War*, BULL. ATOM. SCIENTISTS, July-Aug. 1995, at 13-14.

270. See *id.* at 15.

271. See MCNAMARA, *supra* note 3, at 321.

272. Kaus, *supra* note 12, at 6.

273. Thus, McGeorge Bundy "possesses one of the keenest intellects I have ever encountered . . . [and] was by far the ablest national security adviser I have observed over the last forty years." MCNAMARA, *supra* note 3, at 95. And this man who was "wrong, terribly wrong," "brought to government service a highly disciplined mind of extraordinary quality and *an insistence that we focus on the fundamental foreign policy issues confronting our nation, however difficult they might be.*" MCNAMARA, *supra* note 3, at 235 (emphasis added). Bundy's replacement as National Security Advisor, Walt Rostow, was "an extraordinarily bright man with

erosity with regard to those who despite the administrations' lies and obfuscations were all too terribly right: the antiwar movement and Senator Wayne Morse, who, with Senator Ernest Gruening of Alaska, cast the only "no" votes on the Tonkin Gulf Resolution.²⁷⁴

This division revealed itself, as well, in the inevitable confrontations on McNamara's book promotion tour. At one moment he would pull out and tearfully read a letter from Anne Morrison Welsh, the widow of Norman Morrison, who self-immolated in protest of the war not far from McNamara's Pentagon office window. The letter thanks McNamara for writing the book.²⁷⁵ At the next moment, we see ugly flashes of the old McNamara who, when asked by an angry Vietnam veteran why his friends had to die in a war that McNamara did not believe in, responds: "You're going to have to read the book to get the answer," and when further pressed by the veteran, tells him to "Shut Up!" before launching into a lecture about the domino theory.²⁷⁶

a warm personality and an open approach with his colleagues." *Id.* McNamara also notes Bundy brother Bill's "integrity and intelligence," and adds that Assistant Secretary of State Bill Bundy "was one of my most trusted advisers on Vietnam." *Id.* at 103. General Maxwell Taylor, Kennedy's military adviser, and later Chairman of the Joint Chiefs of Staff, Ambassador to South Vietnam, and special adviser to President Johnson on Vietnam, "was the wisest unformed geopolitician and security adviser I ever met." *Id.* at 54. He also notes his "deep respect and affection for [Secretary of State] Dean [Rusk]." *Id.* at 95. One is left to wonder how the second string could have botched matters much more badly.

274. See *supra* note 257 and accompanying text. For McNamara's rather shabby discussion of Morse in which he fails to mention that Morse was essentially right, notwithstanding administration deception, see McNAMARA, *supra* note 3, at 136-37.

275. See Goodman, *supra* note 204. Morrison's death clearly affected McNamara, and he discusses it briefly in *In Retrospect*, see McNAMARA, *supra* note 3, at 216-17. For more on Norman Morrison and Anne Morrison Welsh, see HENDRICKSON, *supra* note 203, at 187-240.

276. Such a confrontation occurred at a public forum at Harvard's John F. Kennedy School of Government. The story was disseminated nationally. According to one news account:

John Hurley, who identified himself as a Vietnam veteran, told McNamara that his book was an "obscurity." He then asked: "Why did my commander Burt Bunting die when you knew that the war was a mistake? Why did McNally die? Why did Kirkendall die? Why did they die, sir? Why did you remain silent while another 57,000 American troops and 4 million Vietnamese troops died? Why?"

McNamara: "You're going to have to read the book to get the answer . . ."

Hurley: "Sir, sir . . ."

McNamara: "Wait a minute! Shut up!" (Loud gasp from the audience.) "Let me answer. This is a very important question. . . . In 1965 it was believed by senior military officers and by the CIA and by senior officials in the U.S. Government and other governments that the loss of Vietnam to the Communists would lead to the loss of all of Asia and to a catastrophic war. We were trying to use military pressure to move North Vietnam to negotiate to permit an independent South Vietnam that would stop the advance of Chinese and Soviet Communists. And that's why the war went on. As I've said in the book, I thought we were wrong."

Robert McNamara's slow and obviously anguished process of coming to terms with his role in the Vietnam War reminds us that the penitent's struggle is hard and continuing. Recall that Esther Rodgers's path was also difficult and that she traversed it only with an outpouring of help from her community and the prospects of eternal suffering beyond the gallows. For McNamara, for reasons discussed below, no such assistance exists.

McNamara's confession and conversion also differ from Rodgers's in their theological worldview and vocabulary. Unlike Rodgers, McNamara writes in secular terms, and he resists revealing enough about his inner self to identify any religious wellsprings that may be a source of his conversion. This, of course, is not surprising. We live in very different times from Esther Rodgers. Yet, we should not be so quick to dismiss the religious meanings of *In Retrospect*. Specifically, it is useful to consider and elaborate an insight of church historian James Bratt, who notes the problem of bad faith in the book. The charge of bad faith might be leveled at the Kennedy and Johnson administrations for misleading the American people, and at McNamara for falling short of a completely honest account of his past. Bratt insists that we consider "bad faith" in a second sense, the worship of false gods, and specifically the "*idolatry* of reason, nation and numbers."²⁷⁷ This is a charge that the Puritan divines would readily have understood and identified by the same name, although the idolatry that concerned them most was the worship of worldly things and wealth.²⁷⁸

While he never charges into the temple to smash the idols, at *In Retrospect*'s best moments McNamara does break loose from his bad faith. While opponents of the war might justifiably respond to many of McNamara's eleven enumerated "major causes for our disaster in Vietnam,"²⁷⁹ with a collective "duh," it still represents a victory of sorts when he writes that: "We [mistakenly] viewed the people and leaders of South Vietnam in terms of our own experience;"²⁸⁰ "[w]e

Walsh, *supra* note 205, at 9. Such confrontations must have been fairly common during the book promotion tour, although McNamara's reaction at Harvard may not have been. See Berger, *supra* note 205.

277. James Bratt, *Dreams of Vietnam: Robert McNamara and the New Minutemen*, 112 CHRISTIAN CENTURY 1019, 1019 (1995) (book review).

278. See RICHARD L. BUSHMAN, FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765, at 23-25, 188-90, 192-93 (1967).

279. See McNAMARA, *supra* note 3, at 321-23.

280. *Id.* at 322.

failed to recognize that in international affairs, as in other aspects of life, there may be problems for which there are no immediate solutions;²⁸¹ and “[w]e do not have the God-given right to shape every nation in our own image or as we choose.”²⁸² Mostly, however, he remains enchanted by these false gods.

McNamara was, of course, infamously infatuated with numbers, a corporate bean-counter, the systems-analyst par excellence, rightly dubbed *homo mathematicus*.²⁸³ There is nothing intrinsically wrong with quantification. But an emphasis on counting and numbers can obscure both what is being counted and what really matters.²⁸⁴ And numerical yardsticks of success in a setting where the numbers are inherently unreliable can create terrible incentives to cook the books, leaving one with only “an illusion of knowledge.”²⁸⁵ Such was the case in Vietnam. In *The Best and the Brightest* David Halberstam captures the tragi-comic character of this quest for numerical control of disorderly Vietnamese realities in his description of a military briefing in 1965:

One particular visit seemed to sum it up: McNamara looking for the war to fit his criteria, his definitions. He went to Danang in 1965 to check on the Marine progress there. A Marine colonel in I Corps had a sand table showing the terrain and patiently gave the briefing: friendly situation, enemy situation, main problem. McNamara watched it, not really taking it in, his hands folded, frowning a little, finally interrupting. “Now let me see,” McNamara said, “if I have it right, this is your situation,” and then he spouted his own version, all

281. *Id.* at 323.

282. *Id.*

283. Paul Hendrickson dubbed McNamara *homo mathematicus*. See HENDRICKSON, *supra* note 203, at 24.

284. Christian Appy writes:

[E]very act or event deemed relevant to the American cause was quantified and duly recorded, or to put it differently, if an event could not be quantified, it was simply not considered relevant. But virtually everything that could be counted was The command chronologies and after-action reports are filled with long lists of these figures. The numbers appear without comment or emphasis, statistics on candy bars and ponchos appearing alongside numbers of refugees “generated” or wounded soldiers evacuated.

There was in all of the quantification a laughable pretense of precision. Could, for example, a battalion really know that it had lost exactly fifty-two tent pins on an operation? Even if such figures were accurate, which of them is truly important, and in what larger context might we understand their significance? Such questions were hardly, if ever, asked.

APPY, *supra* note 237, at 157.

285. HALBERSTAM, *supra* note 228, at 249.

in numbers and statistics. The colonel, who was very bright, read him immediately like a man breaking a code, and without changing stride, went on with the briefing, simply switching his terms, quantifying everything, giving everything in numbers and percentages, percentages up, percentages down, so blatant a performance that it was like a satire. Jack Raymond of the *New York Times* began to laugh and had to leave the tent. Later that day Raymond went up to McNamara and commented on how tough the situation was up in Danang, but McNamara wasn't interested in the Vietcong, he wanted to talk about that colonel, he liked him, that colonel had caught his eye. "That colonel is one of the finest officers I've ever met," he said.²⁸⁶

Those who lived through the period remember well the flurry of statistics in McNamara's press briefings: the enemy's order of battle; sorties flown; numbers of bombs dropped; targets destroyed in the North; traffic from the North down the Ho Chi Minh Trail; enemy trucks destroyed; kill ratios; enemies captured and deserted; weapons lost ratios; American and South Vietnamese losses; and the body count.²⁸⁷ It is that last bit of numerology that is most enduringly associated with McNamara, and his continued defense of its use shows, perhaps better than anything else in *In Retrospect*, how little he understands his past, and how much he remains transfixed under the spell of his false gods.

McNamara writes that his critics pointed to the body count "as an example of my obsession with numbers."²⁸⁸ He responds that while some things, such as honor and beauty, defy quantification, "things you can count, you ought to count."²⁸⁹ Enemy dead is one such measurable thing. In a rather ambiguous passage, he concludes:

We tried to use body counts as a measurement to help us figure out what we should be doing in Vietnam to win the war while putting our troops at the least risk. Every attempt to monitor progress in

286. *Id.*

287. Christian Appy notes that the "other war," the pacification effort to "win the hearts and minds," was similarly evaluated under crude and generally inapt numerical measures:

Complicated questions about political loyalties and beliefs were reduced to questions about the number of schoolhouses built or toothbrushes distributed. The numbers issued by those involved in the other war . . . always implied that the political affiliations of civilians could be measured simply by how many goods or services were supplied to them

APPY, *supra* note 237, at 157-58.

288. McNAMARA, *supra* note 3, at 238.

289. *Id.*

Vietnam during my tenure as secretary of defense was directed toward those goals, but often the reports were misleading.²⁹⁰

To understand the purpose and meaning of the body count, one needs to understand U.S. military objectives in Vietnam. These objectives were not primarily to win and hold territory, nor even, though we sometimes insisted otherwise, to capture the political loyalty of the South Vietnamese people (the so-called battle for their hearts and minds). American strategy, as designed by McNamara and General William Westmoreland, was one of attrition. The object was to flush out and kill as many of the enemy as possible. Christian Appy writes that the "overwhelming, even obsessive, focus of the American mission . . . [was] to prevent communism in South Vietnam by killing communists."²⁹¹ The warmakers believed that U.S. and South Vietnamese forces would eventually either kill so many of the enemy's forces that it could no longer replace men as quickly as we killed them (the holy grail "crossover point"), thereby crippling the enemy, or, at least, inflicting enough pain that the enemy would willingly agree to acceptable terms for peace. Under this logic the body count became more than another one of the military's indicia of performance, it became *the* indicium of military success or failure.

The attrition strategy created pressure all along the chain of command for high body counts. Body count inflation was rampant and rewarded. Most commissioned officers served a six-month tour of duty in Vietnam, and they understood that their career advancement depended largely on achieving big body counts in this short time. Some units rewarded soldiers with large numbers of confirmed kills with R&R and whole units received leaves in reward for big body counts. Soldiers saw their officers lie about enemy kills and were encouraged to do the same. Late in the war, when Vietnamization²⁹² further demoralized the troops and combat evasion became

290. *Id.*

291. APPY, *supra* note 237, at 153.

292. "Vietnamization" refers to President Nixon's policy (begun in 1969) of withdrawing American troops from Vietnam and gradually increasing the involvement of Vietnamese troops so that a stable Saigon would be left behind when the American troops were gone. See Luu Doan Hunyh, *The Seven-Point Proposal of the PRG (July 1, 1971) and the U.S. Reaction*, in *THE VIETNAM WAR: VIETNAMESE AND AMERICAN PERSPECTIVES*, *supra* note 265, at 200-01.

routine, officers would sometimes radio in fictitious reports of engagements, with, necessarily, fictitious kills.²⁹³

The emphasis on body count created less benign means of inflating the numbers of enemy dead. As Stephen Ambrose notes: "The obvious problem with the body count is that every body counts."²⁹⁴ Civilian deaths were seldom so reported. Rather, civilian and enemy dead were indifferently lumped together. Philip Caputo writes that "[t]he pressure on unit commanders to produce enemy corpses was intense, and they in turn communicated it to their troops. This led to such practices as counting civilians as Viet Cong. 'If it's dead and Vietnamese, it's VC,' was a rule of thumb in the bush."²⁹⁵ This casualness toward civilian Vietnamese death, in turn, belied our stated purpose of protecting the "good" Vietnamese from the depredations of the "bad" ones and undermined many American soldiers' sense of moral order. Psychiatrist Jonathan Shay, who treats Vietnam veterans suffering with Post Traumatic Stress Disorder, has analyzed the sense of betrayal of their moral world that soldiers often felt at the hands of their commanders. One of Shay's patients, an Airborne trooper, recounted watching three boats unloading one night when his unit got mistaken word that they were unloading weapons. His unit unleashed tremendous firepower on the boats. He continues:

293. See *id.* at 156; FRED TURNER, ECHOES OF COMBAT: THE VIETNAM WAR IN AMERICAN MEMORY 26-27 (1996). Inflated or totally invented body counts implied combat heroics and required the awarding of medals. See *infra* note 287 and accompanying text. This practice reached a particularly grotesque nadir in the setting of the My Lai massacre, which had been reported as a military victory over the enemy's nettlesome and elusive 48th Local Battalion, in which 128 enemy soldiers had been killed. See MICHAEL BILTON & KEVIN SIM, FOUR HOURS IN MY LAI 173-74 (1992). In addition to a message of congratulations from General Westmoreland, such a decisive "victory" called for citations of valor. Ironically, recipients of citations included helicopter pilot Hugh Thompson and his crew, supposedly for rescuing civilians caught in the crossfire between U.S. and enemy forces. See *id.* at 204-05. Thompson and his crew had in fact rescued civilians, but the account contained in the recommendation for their citations was fictitious. Thompson and his crew had actually rescued the civilians from American soldiers. At one point, Thompson had instructed his crew to turn their weapons on the American soldiers if they resumed shooting civilians. See *id.* at 137-40. Also recommended for citations were Captain Ernest Medina, the commander of the company responsible for the massacre, and his superiors, Lieutenant Colonel Frank Barker and Colonel Oran Henderson. Both Medina and Henderson would subsequently face courts-martial (Barker, who would also have faced a court-martial, died in the interim), although both would escape conviction. See *id.* at 205.

294. STEPHEN E. AMBROSE, AMERICANS AT WAR 160 (1997).

295. PHILIP CAPUTO, A RUMOR OF WAR, xvii-xviii (1977).

Daylight came [long pause], and we found out we killed a lot of fishermen and kids. . . .

. . . .

The fucking colonel says, "Don't worry about it. We'll take care of it." Y'know, uh, "We got body count!" "We have body count!" So it starts working on your head.

So you know in your heart it's wrong, but at the time, here's your superiors telling you that it was okay. So, I mean, that's *okay* then, right? This is part of war. Y'know? Gung-HO! Y'know? "AirBORNE! AirBORNE! Let's go!"

So we packed up and we moved out.

They wanted to give us a fucking Unit Citation—they fucking maggots. A lot of medals came down from it. The lieutenants got medals, and I know the colonel got his fucking medal. And they would have award ceremonies, y'know, I'd be standing like a fucking jerk and they'd be handing out fucking medals for killing civilians.

. . . .

. . . So in your mind you're saying, "Ah, fuck it, they're Gooks."

I was sick over it, after this happened. I actually puked my guts out. You know what had happened, but—see, it's all explained to you by captains and colonels and majors that "that's the hazards of war. They were in the wrong place." Y'know, "It didn't have anything to do with us. Fuck it. They was suspects anyways."²⁹⁶

The transformation of a soldier's belief that he was in Vietnam to defend the South Vietnamese to the belief that all Vietnamese were the enemy came all too quickly for many Americans. There were several causes of that transition, including the hostility or apparent indifference of many of the South Vietnamese toward their "liberators," the frustration of fighting an enemy who was almost always unseen, and who seemed to slip with ease into the jungle or the populace, official hypocrisy regarding Vietnamese civilians, and the incentives created by a war fought to achieve ever higher body counts. The resulting indifference to civilian death produced an environment that spawned not only My Lai, but the many smaller atrocities and rules of engagement that inevitably put civilians in the line of fire, and which, by conservative estimates, caused at least half a mil-

296. JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 3-4, 171 (1994) (emphasis omitted).

lion civilian deaths and by some estimates caused as many as two million.²⁹⁷

Against this backdrop, McNamara's excuse that "often the reports were misleading"²⁹⁸ is inadequate. It is evasive in its adoption of the passive voice. He does not tell us whose reports were misleading or who is to blame.²⁹⁹ He certainly does not blame himself. Moreover, the problem, he tells us, was not his obsession with counting, but his forced reliance on bad numbers. Better numbers would have

297. See APPY, *supra* note 237, at 202-04 (supporting a half million civilian deaths as a conservative estimate); Edward P. Morgan, *America's Post-Vietnam Stress Disorder*, 8 PEACE REV. 237, 239 (1996). The attrition strategy adversely affected American combat soldiers, also. Although Americans engaged in what were nominally "search and destroy" missions (until General Westmoreland changed the name in 1968 to "sweeping operations," "reconnaissance in force," or "search and clear" because of the negative image that "search and destroy" had amongst the American public) the implication that U.S. forces would find the enemy and engage him was generally not matched by reality. See APPY, *supra* note 237, at 153-56. Throughout the war the enemy controlled when and where they would fight, and American troops were highly unsuccessful in finding enemy soldiers who did not want to be found. One early Pentagon study by Assistant Secretary of Defense Alain Enthoven determined that the enemy initiated 79% and U.S. forces initiated only 14% of the firefights in its sample. See *id.* at 163-64. In subsequent studies, American forces only did a little better; three years later, the enemy still initiated 68% of the engagements. See Ronald H. Spector, "How Do You Know If You're Winning?": *Perception and Reality in America's Military Performance in Vietnam, 1965-1970*, in THE VIETNAM WAR: VIETNAMESE AND AMERICAN PERSPECTIVES, *supra* note 268, at 155. Said one former First Air Cavalry Division company commander:

They were superb at masking their true position. The Americans would move up, you would kill a couple and the rest would run and it was a natural tendency to take off after them. . . . In close terrain against enemy like the North Vietnamese that will get you your nose bloodied. . . . They were absolute masters at choosing the right terrain at the right place at the right time to blow your crap away.

Id. at 156 (quoting interview with Lt. Col. Thomas G. Rhame, "Company Command in Vietnam" series, U.S. Army Military History Institute, Carlisle, Pa.).

Given the inability of the U.S. forces generally to find and engage the enemy on its terms, search and destroy was typically a tactic of dangling American troops as bait to draw the enemy out into the open, where it would be exposed to American air and artillery fire power. See APPY, *supra* note 237, at 182-87; TURNER, *supra* note 293, at 26. The risks and frustrations for the combat forces of being dangled as bait are obvious. Further, the close-in use of rockets, bombs and napalm exposed the combat troops to the danger of "friendly fire." One Pentagon study determined that 15-20% of U.S. casualties were attributable to friendly fire. See COL. DAVID HACKWORTH & JULIE SHERMAN, ABOUT FACE: THE ODYSSEY OF AN AMERICAN WARRIOR 594-95 (1989).

Jonathan Shay sees the sense of physical betrayal by superiors entrusted with their safety in the tactics of search and destroy and the potential exposure to friendly fire, along with the betrayal of the moral order by the indifference to civilian life encouraged by the way the war was fought as major causal contributors to the Post Traumatic Stress Disorder of many Vietnam veterans. See SHAY, *supra* note 296, at 196-97.

298. See *supra* text accompanying note 290.

299. Indeed, the passage is susceptible to the reading that newspaper accounts of Pentagon inaccuracies were misleading, although I doubt he intends to say that.

meant better planning, better decisions, and a better, though still unwinnable, war. He fails to acknowledge the consequences of the American decision to fight a war of attrition and body counts.

The idolatry of reason and intelligence, and of their own ability, was an earmark of those within the Kennedy and Johnson administrations whom David Halberstam ironically called "the best and the brightest."³⁰⁰ Halberstam writes of the group that "they always thought that no one else was quite as smart as they were, that they could play games, and that no one else knew the score."³⁰¹ McNamara was hardly immune, and he remains under the spell today. Hence his self-nomination as an elder statesman deserving of an audience, and his surprise and disappointment on his book tour that no one seemed to want to talk about *In Retrospect's* Appendix, which discusses the continuing threat of nuclear arms.³⁰² His idolatry of reason and intelligence also produced the internal contradiction of lavishing praise for their brilliance on the same people who made, by McNamara's own estimation, a horrible botch of our involvement in Vietnam. The Vietnam War, coupled with other disasters such as Watergate, did much to erode trust and confidence in government. We continue to see the effects of that loss of faith in the near paralysis of government to do more than tinker with old ideas and initiatives, in the deepening disaffection of the electorate with the political process and with those whom they elect, and in the apparently increasing numbers of conspiracy theorists and participants in paramilitary patriot movements. Certainly a big part of McNamara's agenda is to restore confidence in both government and in those who govern.³⁰³ His is a call for us to trust the policy experts (now educated by the Vietnam experience) once again.

Finally, McNamara continues to put the United States at the center of the universe. This is partly an extension of his worship of problem-solving intelligence and of those who have governed in our recent past. Just as the best and the brightest should govern in the

300. HALBERSTAM, *supra* note 228, at 525.

301. *Id.*

302. See Goodman, *supra* note 204 ("Please read the appendix,' McNamara says to one audience, promising that he will refund the whole price of the book to anyone who reads the appendix about the dangers of nuclear war.").

303. In describing why he had written "the book I planned never to write," McNamara states that his main reason for writing "is that I have grown sick at heart witnessing the cynicism and even contempt with which so many people view our political institutions and leaders." McNAMARA, *supra* note 3, at xv-xvi.

collective best interest, even if to do so they must deceive Congress and the American people, so should the United States act in accord with its global ambitions in what had been declared "The American Century."³⁰⁴ This is the McNamara who on his first trip to Vietnam in 1961, having been frustrated in his efforts to find a cold drink, said, "North Vietnam will never beat us. . . . They can't even make ice cubes."³⁰⁵ Sadly, as he now admits, he did not know the Vietnamese then. Sadly, also, he does not seem to know them today.

McNamara's continued Americacentrism can be seen in how little the Vietnamese figure in his book. With the exception of some of the leadership (primarily Diem) they are missing in action. He demonstrates little interest in, or knowledge of, the country and its people. As Richard Reeves notes, "He still calls [Vietnam, a country of over 70 million people, and over 1,000 miles in length] a 'tiny' country."³⁰⁶ And he still focuses virtually exclusively on American harms.

The dominant post-war American myth, at least to judge by the movies and the popular press, describes Vietnam as a frighteningly otherworldly dark place where horrible things happened to well-intentioned Americans who lost their innocence there (as did we as a nation).³⁰⁷ The controlling image is of the American victim. *In Retrospect* shares this edge of the frame focus. That is not to say that the war did not have devastating effects on the United States. There was wreckage aplenty, from the needlessly lost lives and shattered bodies and minds of those sent to fight McNamara's War to the derailing of the post-World War II growth economy, the stillbirth of the Great Society, the unraveling of the New Deal consensus, and the current anti-government counterreformation. Any accounting of the costs of the Vietnam War must include these, along with other costs suffered by the United States. But it must also recognize that the war was foremost a Vietnamese catastrophe. Remarkably, McNamara gives scant mention to the war's costs endured by Vietnam and its people.³⁰⁸ At the book's end, he asks whether the costs were justified, but

304. The phrase is from publisher Henry Luce. See JOHN PATRICK DIGGINS, *THE PROUD DECADES: AMERICA IN WAR AND IN PEACE, 1941-1960*, at 73-74 (1988).

305. JAMES S. OLSON & RANDY ROBERTS, *WHERE THE DOMINO FELL: AMERICA AND VIETNAM 1945 TO 1990*, at 82 (1991).

306. Reeves, *supra* note 243, at 54.

307. How Vietnam is understood by the public, in contrast to how it has been represented to them, is a far more complicated problem.

308. He does write:

It often proved difficult to distinguish combatants from noncombatants. Between 1965 and 1967, U.S. and South Vietnamese air forces dropped over a million tons of

his tally shows that only American costs count.³⁰⁹ To render the Vietnamese so invisible in a war where perhaps three million Vietnamese lives were lost and Vietnam suffered incalculable economic and environmental devastation shows how much further McNamara needs to go to overcome his bad faith and understand his past.³¹⁰

In addition to its focus on how Americans and America were harmed by the war, the postwar myth emphasizes our innocence and the benevolence, however misguided, of the mission. We commonly hear that notion expressed in the description of U.S. involvement in Vietnam as a "mistake." We make mistakes unintentionally, sometimes with the best of intentions. McNamara, however, ought to have known better. That he does not is evident from his extraordinary statement: "I truly believe that we made an error not of values and intentions but of judgment and capabilities."³¹¹ With that statement McNamara indicates his belief that the tragedy of Vietnam was that we fought an unwinnable war, did not recognize soon enough that it was unwinnable, and, once we began to understand that stalemate was inevitable, did not know how to get out quickly. In other words, had we won there would have been no need to confess, as McNamara feels no need to confess regarding our intervention in the Dominican Republic in 1965 to successfully bolster military rule against a popular uprising.³¹²

Often, this story of lost American innocence comes coupled with the quagmire metaphor. *In Retrospect* is essentially an elaborate

bombs on the South, more than twice the tonnage dropped on the North. Fighting produced more and more civilian casualties and squalid refugee camps. The increasing destruction and misery brought on the country we were supposed to be helping troubled me greatly.

MCNAMARA, *supra* note 3, at 243 (footnote omitted). He also includes portions of the text of his May 19, 1967 memorandum to President Johnson on "Future Actions in Vietnam," in which he wrote: "The picture of the world's greatest superpower killing or seriously injuring 1000 noncombatants a week, while trying to pound a tiny backward nation into submission on an issue whose merits are hotly disputed, is not a pretty one." *Id.* at 269 (quoting Draft Memorandum for the President, Subject: Future Actions in Vietnam (May 19, 1967), Robert S. McNamara Papers).

309. *See id.* at 319.

310. For an elaboration of this point, see Maurer, *supra* note 243, at 19.

311. MCNAMARA, *supra* note 3, at xvi.

312. In April-May of 1965, in what was later proven to be a vastly exaggerated response to an overstated fear of communist insurrection, President Johnson sent 22,000 American troops to the small Caribbean country to support the military regime. *See* WALTER LAFEVER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* 157-58 (1983). Johnson advertised the move as a means of preventing another Cuba from threatening U.S. economic development interests in the region. *See id.*

quagmire tale. Brought to Vietnam by a combination of good intentions and naiveté, America's first gingerly steps were enough to mire us. With the assassination of President Kennedy, any hope of getting out of the swamp of Vietnam disappeared.³¹³ Instead, we were drawn in ever deeper despite ourselves, and, as is so often true of quicksand, we found it much more difficult to get out than to get in. In *The End of Victory Culture*, Tom Engelhardt notes two benefits of the quagmire metaphor for American war planners.³¹⁴ First, it transformed Americans from invaders into victims. "For Americans, the initial benefit of the word *quagmire* was that it ruled out the possibility of planned aggression. The image turned Vietnam into the aggressor, not only transferring agency for all negative action to the land, but also instantly devaluing it."³¹⁵ Second, the devaluation of the land served as further proof of America's good intentions. "Here was no rich land to be settled. Its swampy nature made it valueless as real estate and robbed the American presence of any suggestion of self-interest."³¹⁶

McNamara's personal narrative replicates America's. He also acted with the best of intentions, if somewhat naively. By the time his doubts grew strong enough to produce the anguish he records, he, like the U.S., was trapped in a policy of further escalation for fear of the political and strategic consequences of withdrawal. The quagmire metaphor provides McNamara's response to the many critics who ask why he did not resign after he lost faith in the war he was charged with prosecuting. McNamara himself was trapped until President Johnson mercifully engineered his escape to the World Bank.

In keeping with the American myth of innocence and good intentions, McNamara assumes the legality of and moral basis for our intervention in Vietnam. To do so he must assume that South Vietnam was a legitimate state, that North Vietnam was a separate aggressor nation that had attacked South Vietnam, and that the Diem government, and the various U.S.-supported governments that succeeded it, were freely elected, or at least represented the will of the

313. McNamara asserts, with no new evidence, that had Kennedy lived, he probably would have disengaged from Vietnam. See McNAMARA, *supra* note 3, at 97. His analysis, if taken seriously, does much to undermine his grip of the domino-theory explanation for why we fought in Vietnam, but he does not attempt to resolve the contradiction.

314. See TOM ENGELHARDT, *THE END OF VICTORY CULTURE: COLD WAR AMERICA AND THE DISILLUSIONING OF A GENERATION 198-200* (1995).

315. *Id.* at 199.

316. *Id.*

South Vietnamese.³¹⁷ Yet, as the well-trod history of the war shows, none of those assumptions are true. They can only be held by ignoring the meaning of the 1954 Geneva Peace accords, the U.S. role in obstructing their implementation and installing Diem, the repression of the Diem regime and of its successors, and the popular rebellion that emerged in response to U.S. imposition of a repressive government on the South. The myth of America's innocent victimization, which is critical to McNamara's project of rehabilitating faith in government, in the liberal state, and in the American mission in the world requires that we forget that "the shame of Vietnam has lain in the intervention, not the defeat."³¹⁸

There is something to be said for McNamara's anguished attempts to come to terms with his past, especially when compared to Henry Kissinger's nights of undisturbed sleep,³¹⁹ or General Westmoreland's recent gloating that ultimately we won the war because "[t]oday, Vietnam is a basket case."³²⁰ Nonetheless, with his omissions, attempts to shift blame onto others and to excuse himself, his unwillingness or inability to recognize much of the harm that he has done, and the tardiness of his confession, McNamara's confession falls short of the standards of either the Puritans or the Federal Sentencing Guidelines. Clearly, it has fallen short of the standards expected by his readers.³²¹

What can we say about the social consequences of McNamara's confession? Certainly, his hope of helping to heal the wounds of Vietnam has gone unfulfilled.³²² Instead, old hurts, often laying just below the surface, reemerged unalleviated. The book served as a reminder of the extent to which we have unfinished business from the Vietnam War. Nor does he seem a candidate for the sort of public rehabilitation that the unrepentant Richard Nixon, of all people, achieved in his final years.

317. See Morgan, *supra* note 297, at 239; Marilyn B. Young, *The Vietnam War in American Memory*, in *THE VIETNAM WAR: VIETNAMESE AND AMERICAN PERSPECTIVES*, *supra* note 268, at 248, 250-51 (criticizing writings on the war which, though critical of military strategy, leave undisturbed the premise that the intervention itself was morally sound).

318. Young, *supra* note 317, at 255.

319. See *supra* note 262 and accompanying text.

320. Young, *supra* note 317, at 256 (quoting Fox Butterfield, *Voices from the Past Sound Out Again*, N.Y. TIMES, Jan. 25, 1991, at A14).

321. As well as many of his nonreaders.

322. On healing the wounds of the war as one reason for writing the book, see Ed Timms, *Interview: Robert S. McNamara*, DALLAS MORNING NEWS, May 7, 1995, at 1J.

Some of the functions of confession discussed above are simply inapt because there is and will be no criminal proceeding. There are no judges whose consciences need easing. Nor are there angry mobs waiting to riot if sentence is executed without being embraced first by the condemned. Nor still is this an instance where confession serves to bolster governing authority by renouncing sinful or criminal ways. McNamara is not confessing the failure to conform to the norms of his society in the manner of Esther Rodgers. While he might have confessed to war crimes and crimes against humanity, he does not.

Yet McNamara's stated objective is to restore credibility to governing authority. He does this, however, not from the margins of society, as do most of the criminals that we have encountered in this Article. Rather, he speaks as a fallen member of a ruling, but tarnished, elite. His task is uncommon, perhaps unique, in the tradition of American confession literature. It is also fraught with peril. Because our experience with Vietnam involved our discovery of government deceit on a scale that was still capable of producing shock, anything less than complete honesty on his part was likely to exacerbate the problem of cynicism and distrust that he wished to cure. The strong negative public reaction shows that his efforts to rehabilitate his reputation and to restore faith in government and the foreign policy establishment have failed abysmally.

As we saw of Puritan criminal conversion narratives³²³ and modern criminal statements of acceptance of responsibility,³²⁴ the stories told banish other ways of framing our understanding of the events recounted. This is also true of McNamara's confession. Certain topics, such as the class-character of the war,³²⁵ or the secret war waged against Laos with its gloves-off, near-annihilation bombing, are not mentioned at all.³²⁶ Others are quickly dismissed, most notably by

323. See *supra* notes 47-53 and accompanying text.

324. See *supra* notes 133-34 and accompanying text.

325. See *supra* notes 233-37 and accompanying text.

326. The only bombing of Laos that McNamara mentions is that along the Ho Chi Minh Trail. See McNAMARA, *supra* note 3, at 114, 227, 230, 245. He makes no mention of the devastating bombing on the Plain of Jars directed against the Pathet Lao and their supporters. Of Laos, one American official stated in 1960: "This is the end of nowhere. We can do anything we want here because Washington doesn't seem to know it exists." See YOUNG, *supra* note 223, at 234. The war in Laos was fought in that spirit, with the Central Intelligence Agency directing mercenary ground forces and an air war waged by U.S. forces. For additional discussion concerning Laos, see *id.* at 234-35; Noam Chomsky, *Laos*, in AT WAR WITH ASIA 188 (1970); James P. Harrison, *History's Heaviest Bombing*, in THE VIETNAM WAR: VIETNAMESE

McNamara's assertion that the mistakes that he and his colleagues made were management errors, not errors of values. In so doing, he forecloses any considerations of the sources and consequences of American globalism.

Nor has the book acted to create stronger bonds of social solidarity as we have seen other confessions do. The Vietnam War, perhaps coupled with the ugliness of American apartheid and resistance to the civil rights movement, worked what Marilyn Young has described as "the fragmentation of national identity."³²⁷ No longer would Americans uniformly see their history in terms of a metanarrative of a mission to fulfill the Founders' vision of freedom, democracy, and self-determination.³²⁸ Unlike Esther Rodgers, or modern federal criminal defendants, McNamara confesses to a nation still divided over the Vietnam War and over various other issues that we associate with that era. No wonder then, that the generals and admirals who fought the war, and President Clinton, who did not, all point to *In Retrospect* as vindication for their conduct at the time and their interpretation of the war today.³²⁹ Indeed, the debate over the book has often taken on the character of being another front in the war to determine the meaning of our recent past.³³⁰

AND AMERICAN PERSPECTIVES, *supra* note 268, at 130, 132 (noting the 1.5 million tons of bombs dropped on Laos).

327. Marilyn Young, *Dangerous History: Vietnam and the "Good War"*, in HISTORY WARS: THE ENOLA GAY AND OTHER BATTLES FOR THE AMERICAN PAST 199, 208 (Edward T. Linenthal & Tom Engelhardt eds., 1996) (suggesting that the national experience during the Vietnam era forever altered our collective perception of American history).

328. See *id.* at 200-02.

329. See Eugene McCarthy, *The Vindicator: McNamara's Phony Redemption*, NEW REPUBLIC, May 15, 1995, at 14, 14 (criticizing those who feel "vindicated" by McNamara's "confession").

330. The historical literature on the 1960s is large and growing, as is the variety of interpretations of the period. Others have attempted to characterize the period largely in the service of current political ends. See, e.g., PETER COLLIER & DAVID HOROWITZ, DESTRUCTIVE GENERATION: SECOND THOUGHTS ABOUT THE '60S (1989); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984). Recent instances of Sixties-bashing have typically been associated with Clinton-bashing. For example, at the 1992 Republican Convention, Marilyn Quayle suggested that, unlike the Clintons and other baby-boomer Democrats, "Not everyone demonstrated, dropped out, took drugs, joined in the sexual revolution, or dodged the draft." David S. Broder & Ruth Marcus, *Bush Nominated for "Fight of Our Life,"*; Marilyn Quayle, *Martin Paint Clinton as Unfit for Presidency*, WASH. POST, Aug. 20, 1992, at A1. Nor did most women, Quayle added, "wish to be liberated from their essential natures as women." *Id.* Also, after the 1994 Congressional elections, Speaker of the House Newt Gingrich referred to the Clintons as "counterculture McGoverniks" and blamed the lion's share of the ills of American society on Lyndon Johnson's Great Society programs. Maureen Dowd, *G.O.P.'s Rising Star Pledges to Right Wrongs of the Left*, N.Y. TIMES, Nov. 10,

III. CONCLUSION

All this talk . . . of a guilt complex displays something untruthful. Psychiatry, from which the phrase is borrowed . . . implies that such guilt feelings are pathological, inadequate to reality: "psychogenic" as analysts call it. With the help of the word "complex" the impression is created that the guilt—which so many fend off, abreact, or deflect through the craziest rationalizations—is really no guilt at all, but exists only inside them, in their psychological makeup. So a real and terrible past is rendered harmless by being transformed . . . into a mere figment of the imagination of those who are affected by it.³³¹

By God, we've kicked the Vietnam syndrome once and for all!³³²

One reason the Vietnam syndrome cannot be cured is because it is not an illness. Rather, the illness resides in the drive to cure our mature resistance to war.³³³

An important insight of the New England Puritans that seems lost on most of the critics of *In Retrospect* is that of collective responsibility for harms. Much of the criticism of McNamara's confession is telling and appropriate. Yet the discussion suggests that we have made little progress as a country in coming to terms with our past.³³⁴

That we have learned something from the Vietnam experience can be seen in the growing resistance of the American people to for-

1994, at A1; see also Dale Russakoff, *Gingrich Lobs a Few More Bombs*, WASH. POST, Nov. 10, 1994, at A1 (discussing same). In a similar vein, see George Will's column attributing the behavior of Melissa Drexler, an eighteen-year-old who, after concealing her pregnancy and giving birth in the bathroom at her high school prom, discarded the baby in the trash and left it to die, to "condom-dispensing schools," sex education in schools, and to *Roe v. Wade* and "today's abortion culture." George Will, *Thanks to Roe: A Mom, a Prom, a Dead Baby*, PLAIN DEALER (CLEV.), June 13, 1997. Will's analysis might have surprised Esther Rodgers, Sarah Threeneedles, and the other young New England perpetrators of infanticide.

For a discussion of the battle over the meaning of the Sixties, see generally PAUL LYONS, *NEW LEFT, NEW RIGHT, AND THE LEGACY OF THE SIXTIES* (1996).

331. Theodor W. Adorno, *What Does Coming to Terms with the Past Mean*, in BITBURG IN MORAL AND POLITICAL PERSPECTIVE 114, 117 (Geoffrey H. Hartman ed., 1986). My thanks to my colleague Ken Ledford for calling this essay to my attention.

332. Exclaimed by President George Bush the day after the American defeat of Iraq in the Gulf War. See HERRING, *supra* note 223, at 311.

333. AVITAL RONELL, *Activist Supplement: Papers on the Gulf War*, in FINITUDE'S SCORE: ESSAYS FOR THE END OF THE MILLENNIUM 293, 296 (1994).

334. For additional discussion of how we remember Vietnam, see generally Morgan, *supra* note 297, at 239-42; Young, *supra* note 327, at 200-09; Young, *supra* note 317, at 256. I also draw on Adorno, *supra* note 331, at 123-29.

eign intervention and to deference to the executive branch regarding what constitutes a threat to national security. Those bent on unrestrained exercise of American power in the world ridicule this tendency as the "Vietnam Syndrome." In so doing, they medicalize and dismiss as pathological the maturity that we lacked as a nation when Robert McNamara served as Secretary of Defense. Like those Germans who wished to dissolve all memory of responsibility for the crimes of the Third Reich, these advocates of the new American century see memory and history as threats to be contained. As Theodor Adorno noted of the German tendency to evade its recent Nazi past, the problem is not primarily one of unconscious desires to tidy up one's history. Rather, he wrote: "The effacement of memory is more the achievement of an all-too-wakeful consciousness."³³⁵ Adorno's observation that the struggle over how to remember the German past was a political struggle is apt as well for the United States.

Too often, we seem to deal with Vietnam by slipping into fantasies. We cast our intervention as a well-intentioned blunder. Ignoring the ferociousness of the war and the costs imposed, primarily on our "ally," South Vietnam, we tell ourselves that the war could have been won if the military had been "allowed to really fight." Inverting the images of the war, as Michael Cimino's *The Deer Hunter*³³⁶ inverts the famous image of our agent, Chief of the South Vietnam National Police, General Loan, shooting a bound Viet Cong suspect in the head at point blank range, to turn America and Americans into the victims and Vietnam and the Vietnamese into the aggressor,³³⁷ we make the Vietnamese virtually disappear from the story. Or we congratulate ourselves for actually having won.³³⁸ The rest of the world cannot abide such fantasies, and neither can we.

335. Adorno, *supra* note 331, at 117.

336. *THE DEER HUNTER* (EMI Films, Inc. 1978).

337. See Morgan, *supra* note 297, at 241.

338. See, e.g., W.W. Rostow, *Rostow Sees Larger Victory in Loss in Vietnam*, AUSTIN AM.-STATESMAN, Apr. 11, 1995, at A1 (claiming that although we lost the battle in Vietnam, it helped us to win the war in Southeast Asia); Young, *supra* note 317, at 256 (citing General Westmoreland's boast that "[w]e won the . . . war after we left" (internal citations omitted)).